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LEGITIMATE PUBLIC PARTICIPATION IN CONTROVERSIAL SITUATIONS:  
QUESTIONS FROM THE BURNED AREA RECOVERY PROJECT ON THE  
BITTERROOT NATIONAL FOREST

by

Alexander E. Dunn

B.Sc. University of Oregon 1998

presented in partial fulfillment of the requirements

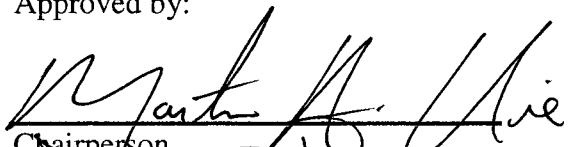
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Master of Science

The University of Montana

August 2004

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Legitimate Public Participation in Controversial Situations: Questions from the Burned Area Recovery Project on the Bitterroot National Forest

Chairperson: Martin A. Nie



Questions about legitimate public participation in administrative decision making are examined through a case study of the use of public participation in the process of planning the Bitterroot National Forest's Burned Area Recovery project. The significance of this project in acting as a precedent setting policy case contributed to its highly controversial nature. Multiple methods are used to analyze and discuss the issues of legitimacy and conflict management surrounding public participation as illustrated in this controversial and precedent-setting case. These methods include legal and government document reviews as well as semi-structured, in-depth interviews with participants from three interest groups: Forest Service, environmental community, and timber industry. An effort was made by agency officials to go beyond the legal requirements of the law in administering innovative and non-traditional techniques for participation. Furthermore, a legal analysis of statutes, regulations, and case law elucidates trends in public participation in Forest Service decision making. Results from participant interviews reveal discrepancies among interest groups as to what constitutes legitimate participation as well as the theoretical perspectives they ascribe to while discussing the process. Recommendations are made for designing processes that allow for multiple perspectives on participation to exist, that allow for multiple discourses to be communicated, and that provide opportunities for common technical data to be created. It closes by posing a number of questions that are essential and still unresolved in administrative decision making.

## CONTENTS

I.	INTRODUCTION	
A.	Background of the Problem.....	8
B.	The Policy Problem: Public Participation and Conflict Management for National Forest Planning.....	15
II.	APPROACH AND LITERATURE REVIEW	
A.	The Policy Sciences Approach.....	18
B.	Theoretical Perspectives on Participation and Conflict in Policy-Making.....	20
C.	Using the Perspectives of Policy Participants: Empirical Research.....	28
D.	Summary of Rationale for the Study.....	32
III.	DESIGN AND METHODOLOGY	
A.	The Sample.....	34
B.	Study Design.....	35
C.	Procedures and Data Collection.....	36
D.	Data Analysis.....	38
IV.	RESULTS AND DISCUSSION	
A.	Statutory Mandates for Public Participation in Forest Service Planning.....	40
A.1.	The Administrative Procedures Act (APA).....	41
A.2.	The National Environmental Policy Act (NEPA).....	43
A.3.	The National Forest Management Act (NFMA).....	47
A.4.	Discussion: Public Participation for Planning and Decision Making Under the Forest Service—Highly Procedural and Certainly Rational...But is it Meaningful?.....	49
B.	A Chronology of Modes of Public Participation Administered by the BNF for the Planning of the BAR Project.....	56
B.1.	“Community Opportunity Series”—An Atypical Mode.....	57
B.2.	The Social Survey—Another Atypical Mode.....	60
B.3.	The Publication of the Post-Fire Assessment-NFMA Public Part.....	62
B.4.	Scoping for the BAR EIS-The NEPA Process Begins.....	63
B.5.	The Publication of the BAR Draft EIS.....	66
B.6.	The Publication of the BAR Final EIS.....	69
B.7.	Discussion: The BAR Public Participation Process: Innovative Early then Largely Procedural.....	70
C.	Participant Perspectives on Participation and Conflict.....	75
C.1.	Comparing Perspectives on Legitimate Participation and Conflict...75	
C.1.1.	Perspectives on ‘The Process’.....	75
C.1.2.	Agency Perspectives.....	77
C.1.3.	Environmental Community Perspectives.....	79
C.1.4.	Industry Perspectives.....	80
C.1.5.	Issue/Challenge: Do Varying Expectations of the Process Contribute to Conflict and Legitimacy?.....	82
C.1.6.	Conclusion: Distorted Communications and Expectations.....	83

D. Participant Perspectives on Modes of Participation for the BAR Project.....	85
D.1.-11. Perspectives on Modes of Participation.....	86-108
V. CONCLUSIONS AND RECOMENDATIONS	
A. Conclusions: The Policy Problem Re-Defined.....	109
A.1. Ample Agency Discretion and Congressional Intent for Meaningful Public Participation.....	112
A.2. The Procedural Requirements of the Law Were Fulfilled While an Effort was Made to Break From Tradition.....	112
A.3. Varying Expectations of the Participants: Legitimacy and Conflict	114
A.4. Participant Perspectives on the Modes of Participation.....	115
A.5. Summary of Conclusion.....	116
B. Recommendations.....	118
B.1. Meeting Participant Expectations: An Integrative Approach.....	119
B.2. Customizing Modes of Participation for Interest Groups.....	120
APPENDIX A: Interview Questionnaire.....	122
APPENDIX B: Excerpts from Selected Interviews.....	123-158
BIBLIOGRAPHY.....	159

## I. INTRODUCTION

The Forest Service needs to not only increase their level of trust or the public's trust and the environmental community's trust and the industry's trust, but also they have to increase their transparency. They have to be visible; they can't just assume 'hey, here is the process to go through.' They can't just do the process and develop any level of trust. And it's certainly not transparent. The question is how effective is this process? (Industry 1).

Public participation is widely recognized by public land management agencies, academics, politicians, and citizens as an integral part of environmental analysis (Webler et al. 2001). Although this recognition is widespread, beliefs about what constitutes an effective, successful, and legitimate process for involving the public vary.

The concept of legitimacy in administrative decision making is contested. It is a word that is often used by academics who study public participation to describe a "good" democratic process. Questions about the concept of legitimacy in democratic decision making often include factors related to accountability, transparency, and representation. These are often cited as important to the process of legitimizing decisions made in a democracy. Those interviewed for this study would likely agree, but they also often understand the concept from a more interest or ego-centric perspective. That is, they sometimes question the type of participation engaged in by their adversaries as being illegitimate, while seeing their own as healthy and productive. Readers must therefore be critical when thinking about this concept and continually ask the question of whether it is the *process* that political actors dislike or whether it is the *decision* made using that process. As will be discussed further, the relationship between policy process and outcomes is closely knit.

Questions about legitimacy are rampant in the study of administrative decision making. Should Congress or bureaucracy, for example, be making value and interest-

based political decisions about public lands management? And if accountability is important to legitimacy, do increased calls for public participation muddle the concept? Or should we simply rethink our understanding of accountability? And what role does transparency play if agencies are simply required to “consider” the public’s input on various matters? Everyone seems to agree that the “public” should have an opportunity to participate in decisions like the BAR project. There also seems to be some agreement that agencies can utilize public participation in more effective ways in the future. However digging a little deeper reveals more significant questions about legitimate decision making for public land management. These and other questions are explored in the following pages.

Public participation as administered by the United States Forest Service (USFS) is an appropriate area within the environmental policy making arena to investigate the issues mentioned above. Conclusions regarding these issues however, depend on the particular set of criteria used to judge the success or effectiveness of a public participation process—in other words, used to define legitimacy. The criteria used in this study are: (1) legitimacy as defined by a select group of participants and administrators (i.e., is it a valuable way to participate?), and (2) conflict management among these stakeholders and the agency (i.e., can conflict be managed using these processes?).

The context in which these questions are addressed is a case examination of public participation for the planning of the Burned Area Recovery Project (BAR) on the Bitterroot National Forest (BNF) in Montana. This high profile Forest Service project that aimed to recover burned BNF lands after the 2000 fire season is no exception to the controversy surrounding the issue of legitimate public participation. The BAR became the epicenter for a national level political conflict over how to manage lands after fire and

illustrates many of the major challenges with regard to public participation in agency decision-making. What is also noteworthy is that the BNF attempted to do things somewhat differently with regard to the use of public participation in planning the project. By using what it believed to be innovative public participation forums, the agency attempted to meaningfully involve the public and reduce conflict that had been commonplace in public participation forums in the past. Namely, in addition to the more traditional 'notice and comment' ways of involving the public, the planning process for the BAR included modes of participation such as small-scale community meetings and a social survey. These innovative participation techniques aimed to work with the public in a different way by, for example, involving a sector of the public that had not traditionally participated. Generally, the design and administration of the public participation program for the planning of the BAR was to be a departure from traditional Forest Service public participation.

The use of public participation for the BAR project will be analyzed from the standpoint of legitimacy. Legitimacy can be conceptualized in a number of different ways. To better understand what factors contribute to legitimacy in the case of the BAR project, this study addressed the following questions: (1) what particular modes of participation administered by the BNF were available to the public and how do these compare to the legal requirements for USFS public participation, (2) what are the perspectives regarding process legitimacy and conflict management of the participants in this study and what modes are preferred by these study participants?

Two methods were used to answer these questions: (1) legal and government document review and (2) participant perspectives obtained through interviews with members of agency, environmental, and industry interest groups.

The following is a summary of key findings. With respect to question one, the results show that the specific modes used by the BNF not only met the procedural requirements of the statutes and regulations, but also included two modes that were specifically intended to be innovative and non-traditional (i.e., the small-scale community meetings and social survey). Furthermore, the administration of these innovative modes occurred early on in the planning process. As the process proceeded, however, it increasingly resembled the traditional, highly procedural model of participation described in the statutes and regulations governing public participation.

Responses to question two revealed a variation among interest groups both in terms of the specific mode of participation used by the BNF and in terms of the legitimacy of the process as a whole. Respondents from the agency predominantly expressed the view that the modes of participation that they administered were exhaustive and legitimate. In addition, some agency study participants felt that the public participation process did not manage conflict effectively because the environmental and, although to a lesser extent, industry groups often corrupted the legitimacy of these modes through their strategic use of them. Agency participants also expressed their belief that the aim of the environmental community's strategic and thus illegitimate use of these processes was to delay or stop the implementation of the project. Agency perspectives regarding the design of public participation modes consistently indicated an intention to increase participation by a sector of the public that does not normally participate. This, they believed, was to be accomplished in part by limiting the opportunity for illegitimate "grandstanding" and other political forms of discourse that had occurred in past public participation forums such as public meetings. By contrast, a similar desire and intention, to design innovative forums specifically for the participation of the environmental and



industry interest groups, was not expressed. In sum, the agency viewed the process as a technical and rational analysis of the impacts of a proposed project and not an avenue to gain political power.

Environmental community participants most often defined legitimacy as the ability to affect the outcome of the decision. These participants also defined legitimacy, although to a lesser extent, in terms of process measures such as learning and relationship building, however, the ability to affect the outcome was paramount. These participants felt that, although one mode of participation may have been more valuable than another, the process as a whole as administered by the BNF was not legitimate because input given through these modes did little to affect the outcome of the BAR project. Furthermore, input from the environmental community was used by the agency in a strategic fashion to legally defend or “bulletproof” what the environmental community perceived as a pre-determined outcome. By contrast, other power-based and political forms of participation were perceived as more effective at influencing the outcome. Similarly, with respect to conflict management, the agency’s administration of these modes failed to effectively manage the conflict because conflict management was based on whether the agency used their input to change the outcome. In sum, study participants from the environmental community believed that the agency rendered public participation irrelevant in shaping the outcome because their decision was pre-determined and in fact it was the agency that used the process strategically and therefore illegitimately. Generally, these participants preferred modes of direct participation and negotiation with agency decision-makers that would have direct bearing on the outcome. However, because of the agency’s perceived lack of responsiveness even to direct participation these participants also emphasized the value of litigation that forced a mediated settlement

agreement. Environmental community participants also expressed willingness and desire for face-to-face interaction with industry representatives during the planning process for projects and indicated that they had, in fact, created opportunities for this type of interaction during the planning process for the BAR.

Industry study participants most often defined legitimacy as how well the process integrated public input that resulted in an improvement “on the ground”. Although all industry participants expressed some level of dissatisfaction with particular modes of participation as administered by the BNF, these participants did not go as far as the environmental community to say that the entire process was illegitimate, with one notable exception. Industry participants also expressed their belief that agency administered modes of participation had been corrupted by the environmental community and, in this sense, were illegitimate. Specifically, the strategic use of BNF administered processes as well as the use of appeals and litigation by the environmental community was viewed as illegitimate because they were intended to influence large-scale forest policy through site-specific project planning. Furthermore, industry believed that the environmental community’s strategic use of participation was intended to delay or stop the implementation of the project. However, some industry participants mentioned that “all sides” participate in strategic ways. Industry participants in this study also expressed their preference for direct participation and negotiation with agency officials. Two industry participants expressed a desire for face-to face interaction with the environmental community and that they had created opportunities for this during the planning of the BAR.

In sum, the results of the study, not surprisingly, reveal different perspectives among the three interest groups regarding the legitimacy and conflict management

capacity of the public participation process for the BAR. However, it is noteworthy that study participants from all three groups expressed their belief that at least one of the other two were participating in the planning process strategically and therefore illegitimately. Generally, the industry and agency interest groups expressed similar views on the environmental community's illegitimate use of strategy, the environmental and industry groups expressed similar views on the agency's strategic and illegitimate use of the process, while the largest differences in perspectives occurred between the agency and environmental community. Participants from environmental community and industry shared preferences for direct participation and negotiation with agency decision makers as well as expressed their belief that their input, if it was only integrated into the outcome by the agency, would improve conditions "on the ground." Participants from these two groups, although to a lesser extent, also shared a desire for interaction between them.

Based on these findings, the following recommendations may serve to increase interest group participants' sense of legitimacy and conflict management throughout the public participation process. In general, the agency's public participation modes should be customized to engage with organized interest groups and the public at large separately. As exemplified by the BAR case as well as others, these groups can impede plan implementation at the expense of what the agency considers to be the goals of the public at large. Although these communities impede implementation because they may not believe that their input influenced the outcome, these outcome goals may in fact be shared by the interest groups and the public. If a sense of process legitimacy is not fostered through the process of participation however, the goals of both these groups and the public at large may not be realized. Consequently, equal effort should be made to design forums for public participation that target simultaneously the public at large and

organized interests, thereby specifically providing a forum for direct participation in the outcome and increasing participant's sense of process legitimacy. This design consideration in combination with explicit and clear expression of the function that solicited input will play in these tailor-made processes may help to meet the differing expectations of the participants. Recommendations for customizing individual modes of participation that respond to these general recommendations are described in the *Discussion* section of this manuscript.

## **A. Background of the Problem**

This section discusses the physical, social, and legal/political contexts in which the planning of the BAR project took place. These contexts not only serve as a background for the study, but also as a critical lens through which the study's results can be discussed.

### ***A.1. The Bitterroot Fires of 2000: Effects on People and Public Debate***

The summer fire season on the BNF was one of the largest the region had experienced since 1910. The fires of 2000 in the Bitterroot Valley burned approximately 307,000 acres of National Forest and burned or threatened over 170 homes. Twenty-four percent of Bitterroot Valley residents were either evacuated or prepared to evacuate (University of Montana 2001). There is no question as to how the valley's residents were affected by the fires of 2000. Halvorson (2002, 4) discusses some of the human effects of the fires on the communities living adjacent to the BNF:

In general, everyone in the area felt impacted either by the fires directly as in the case of evacuations or the loss of property or in terms of the effects

of the smoke and ecological devastation. A major concern expressed ... was the impact of the fire hazards, smoke, and road closures on local businesses, work, school activities, and human health. Others who were located in less threatened areas felt the smoke and the fires were obstacles or inconveniences to day-to day tasks and family and school activities. Those who lost their homes, livestock, and/or pastures were significantly traumatized by the fires. Months after the fires, people were still terrorized by the memories of the sounds and smells of the fires and were fearful about potential flood hazards and mudslides that could be induced by spring and summer rains and snowmelt.

Although the communities in the Bitterroot Valley generally experienced a “drawing together during the fires” in response to the threat they posed, they appeared to be moving apart after the fires were out as “there wasn't so much posturing and politicizing during the fire, the soapboxes came out after the threat was gone” (Respondent #5, 2002). Another participant stated their perspective more bluntly when referring to the debate about what to do *after* the fires: “My perception of the fires of 2000 is that they have polarized the community” (Respondent #2, 2002). Furthermore, the following comment made by a Bitterroot Valley resident, offers an insight that the conflict over what to do after the fires of 2000 may be part of a steady stream of conflicts over forest management that has been prevalent for decades: “There was a brief respite, given the nature of the Bitterroot, before the finger pointing started” (Respondent #3, 2002).

Officials on the BNF were also conscious that the process of involving the public in answering the question of ‘what to do after the fires?’ was contentious.

I think everybody involved, myself included, was frustrated. The public involvement process we have as part of our decision making certainly frustrates me. I don’t want to speak for anybody else, but on the other hand I sense that there's a lot of frustration whether you’re a proponent of an action being considered or whether you’re a critic of an action; somehow that process doesn’t serve people well. But I’m not sure it serves the agency well either, because I think the ability to hear from people is critical (Respondent #6, 2002).

Thus, it appears that the fire did not necessarily have a negative effect on relationships among community members, but the process of answering the question of what to do on the burned BNF land did.

### ***A.2. The Burned Area Recovery Project: A Wicked Policy Problem***

The planning of the BAR project can be conceptualized as a “wicked” policy problem—one with no perfect solution largely because the problem itself is ill-defined (Nie 2003). As this type of problem has become more commonplace in planning-intensive forest management (Nie 2003), solutions to it are difficult to achieve through traditionally rational, scientific investigation and analysis. This type of policy problem is wicked largely because of the complex and “messy” context within which it occurs. In short, conflict among different parties during the planning of wicked policy problems largely occurs as a result of the struggle to define what the problem actually is. In this sense interested parties may frame and re-frame the problem in a way that furthers their interests. Furthermore, the tendency for those who successfully define the problem to control of the formation of the policy outcome, contributes to the intractability of the debate about what the problem is and what policy solution is best.

In the spring of 2001, the BNF proposed the Burned Area Recovery project (BNF 2001). Although the project was intended to recover the BNF lands affected by fire, it turned out to be the focal point of a more general debate about fire and forest management policy. This is due in part to the fact that a number of contentious and long-standing policy issues were embodied in the project including logging aspects of fire management programs (McCool and Guthrie 2001). Notably, the majority of the treatment types proposed in the BAR project involved salvage logging (BNF 2001). This

contributed to the ‘messiness’ of the situation. Scientific disagreement about the ecological benefits and costs of salvage logging treatments proposed in the BAR project was a focal point in the debate to define the policy problem. Furthermore, the planning of this type of ‘messy’ project can be difficult because there are no simple solutions to the questions being asked, particularly when scientific agreement is absent. McCool and Guthrie (2001, 310) note that “While a few recent studies have examined measures of successful public participation, none have specifically linked such measures to messy situations.”

### ***A.3. The Messy Situation: History of Large-Scale Political Conflict over National Forest Management on the BNF***

One particularly salient factor contributing to the wickedness of the BAR project is the history of conflict surrounding NF management in general. The BAR project’s site-specific controversy is also embedded in a more general, large-scale struggle over the management of National Forests. Generally, the National Forests have been fraught with conflict for the past century, much of it playing out on individual forests with national level implications. The BNF is no exception.

*A.3.1. The Lack of Specific Congressional Mandates for National Forest Management and the Shift of Conflict to the Project Level Planning Process.* Many identify the overlapping, contradictory, and often vague substantive mandates intended to specifically guide natural resource management agencies as a source of ongoing controversy (Clarke and Angersbach 2001; Nie 2003). These statutory discrepancies also contribute to the wickedness of natural resource policy problems (Nie 2003) as it is this lack of clear mission that has left the agency with considerable discretion to choose

which of the 'multiple uses' forest planning and project implementation complies with. As a result, political conflict over natural resource management, particularly on public lands, has increased in recent years (Nie 2003). The site of this conflict occurs in multiple political venues. One typical venue for the management of such conflict is Congress. In this case Congress has spoken rather vaguely on the issue and does not appear to be eager to provide clarity anytime soon (Nie 2003). Since the passage of more recent substantive laws guiding Forest Service mission priorities such as the National Forest Management Act and the Multiple Use and Sustained Yield Act (aptly named to illustrate the unclear mission handed down to the agency), the venue of choice for interest groups who hope to influence the mission of the agency has been the courts. Although advocates have successfully influenced the direction forest management should take through the use of the courts, particularly environmental advocates (Hoberg 2001), project level planning processes have also been the site of conflict over the direction of policy (CRMW, 1999).

The considerable influence of the environmental movement on the direction of Forest Service policies in recent decades has generally caused the timber industry to become more active in project level participation and in the courts. A timber industry participant interviewed in this study alludes to the importance of the legal/formal NEPA process of participating in the planning of projects as having, somehow, escaped the timber industry until relatively recently:

The multiple use groups I don't think really ever caught on in time to the significance of the scoping [a project level planning process] and, by the time that they did, which was probably at least half way through the Clinton administration, it was too late. There were too many precedents set and their ability to give solid input was limited. Frankly, there weren't that many EIS's being promulgated by the agency towards multiple use management. (Industry 10).



As this participant explains, the focus of National Forest management had shifted from timber extraction (Hoberg 2001), or ‘multiple use’ management, to ‘ecosystem management’ whose tenets are a clear indication of a shifting philosophy in the agency toward environmental values. It is perhaps because of this shift, (indicated here as a result of a top-down change in management philosophy but in fact partly a result of successful litigation by the environmental community) that representatives of industry, having had no reason to *formally* participate in the planning of agency projects prior, began to actively participate in the NEPA process. Not only did advocates of industry begin to actively participate in NEPA, but they also began to view the venue of the courts as a way to influence the implementation of the vague statutes guiding Forest Service policy. An industry participant in this study remarked: “What’s been interesting this year is that there have been a couple of forest industry lawsuits” (Industry 7).

Understanding these aspects of the problem discussed above helps to put the public participation process for the planning of the BAR in its legal/political context. Two factors are at play: (1) the unclear direction handed the Forest Service by Congress and (2) the fact that gaining the legal standing to file suit against the agency requires participating formally in the project planning process, the procedures for which are largely governed by the National Environmental Policy Act (NEPA). As a result, project level NEPA processes have functioned both as a way to directly participate in policy level debate as well as to ensure that the courts will be an available avenue to influence policy. As a result of these factors, the venue for political conflict regarding large-level policy direction often shifts to site-specific project level planning processes. Whether the project level planning process should be the venue for influencing the direction of National Forest management is being debated and is an aspect of this messy situation that

further complicates site-specific project planning on National Forests. As conflict has shifted to the project level planning process (and that there is no indication that the conflict will move elsewhere in the near future), addressing the effectiveness of this venue for conflict management is timely.

*A.3.2 Clearcutting and Salvage Logging.* Another controversy over past management practices such as clear cutting and terracing of BNF lands gained national prominence in the ‘Bolle Report’ (Behan 2001). This highly publicized and critical indictment of BNF timber management practices was perceived by the public and some elected representatives, along with other high profile (although local) cases, as an abuse of the Forest Service’s ‘multiple use’ discretion. These cases were of such high interest nationally that they provoked the Congress to come up with a statutory response which took the form of the National Forest Management Act (NFMA). While considerable debate exists as to whether the NFMA was an appropriate solution to local, site specific cases of agency abuses, the substantive issues at their root continue to persist in the debate over current management actions. Much of this national level debate has played itself out on the BNF; as one participant put it: “controversy is engrained in this valley; the forest was built on controversy” (Agency 8).

Salvage logging as a post-fire vegetation treatment has also been an issue of great interest to both timber and environmental communities in the recent years. The 1995 ‘Salvage Rider’ suspended environmental review for all salvage projects for a period of five years (Behan 2001), raising the ire of the environmental community and, arguably, inciting a backlash against this kind of vegetation treatment in general. Many of the environmental community participants in this study indicated their involvement in “campaigns” against timber sales promulgated under the rider.

The history of the ongoing disputes over various facets of National Forest management, that have reached national level proportions (Davis 2001), illustrates the larger, value-laden political context within which the BAR project was situated. Public participation in the BAR, therefore, may be viewed as an additional venue through which interest groups and the public sought to influence the direction of National Forest management in general. Viewed in this light, the conflict escalated not only because of the issues raised in the planning of the BAR (e.g. post-fire salvage logging), but also the project's precedent setting potential. Given the magnitude of the fires, and the propensity of the Bitterroot to act as a policy setting forest in the past, whatever happened on the BNF after the fires could have become the standard for post-fire recovery efforts in the future—not only on the BNF, but throughout all National Forests. The Bitterroot case is thus particularly important to learn from because of its potentially precedent-establishing nature.

## **B. The Policy Problem: Public Participation and Conflict Management for National Forest Planning**

The Forest Service has attempted to manage this large-scale political conflict, in part, through the involvement of the public in the planning process. The results have been, at best, mixed (Steelman and Ascher 1997) and, at worst, a failure as indicated by the widespread observation that management conflicts among user groups have increased, especially among those involved in Forest Service planning (Germain et al. 2001). Wondolleck speaks to this idea as she states, “It is impossible to look at an agency estimating that it will receive upward of one-thousand administrative appeals on its forthcoming forest plans and not wonder if something is not amiss” (Wondolleck

1988, vii). These circumstances create an atmosphere in which agency officials are designing resource management plans in increasingly contentious settings (McCool and Guthrie 2001). Conflict management in this contentious climate may be particularly important to a participant's sense of legitimacy. Furthermore, conflict management and legitimacy are not necessarily perceived separately as "legitimacy is based, in large part, in how well the process manages conflict" (Webler et al.2001, 435).

Some previous studies have defined the specific indicators that contribute to legitimacy through the voices of study participants themselves (McCool and Guthrie 2001; Mascarenhas and Scarce 2004). Implicit here is that legitimacy needs to be defined by those involved in the process because conflict management can only be achieved if the interested parties feel they have been satisfied on a number of levels (Smith and McDonough 2001). Furthermore, as Kleindorfer (1998) explains, the *process* of legitimation is one "by which a decision maker explains to himself and other stakeholders in a given decision problem why the choice made and the decision process followed were reasonable." This addition to the understanding of legitimacy acknowledges the decision makers critical role in the process of planning: they are the party who ultimately makes the decision and if their decision process is not seen as legitimate, then the decision itself may suffer the same fate. The connection between the *process* of legitimation and the perceived legitimacy of the policy *outcome* of the decision will be important to keep in mind throughout this study.

Contributing to this conflict is the fact that discrepancies may exist among participants based on the theoretical frame through which they view the process. In other words, participants who have differing expectations of the process may be less than satisfied if those expectations are not met. As Steelman and Ascher (1997, 74) note that

“the partial explanation for the failure of some public involvement exercises can be contributed to the confusion over the function public input is to play in the policy making-process.” This confusion may consequently contribute to the level of conflict among the participants.

Only after a policy problem is fully defined can effective policy solutions be created (Clark 2002). Clarifying the policy problem of legitimate participation will be accomplished by identifying and discussing the issues of legitimacy mentioned by study participants. Also, comparing the theoretical perspectives on participation that these participants hold will help accomplish this goal. Problem clarification will therefore be accomplished through collecting and comparing the perspectives of the participants in the public participation process. The approach described here will help to clarify the participant’s perspectives about what constitutes legitimate participation that can manage conflict and may serve as one step toward the resolution of this wicked policy problem.

## **II: LITERATURE REVIEW**

In this chapter theoretical and empirical work on public participation in natural resource planning is reviewed. Specifically, the concept of policy problem definition is addressed within the policy sciences approach; theoretical perspectives on conflict management in public participation processes are discussed; and, empirical studies examining participant views on policy processes and outcomes are reviewed. This body of knowledge is employed to provide a conceptual framework and an empirical rationale for this study.

### **A. Policy Sciences Approach**

According to Laswell (1951), one of the roles of policy science is to strengthen democratic decision-making by providing the means for citizens who are affected by policies to have input into their formation. Contemporary political theorists, such as Fischer (1993), have advanced a conception of a deliberative, democratic, and public participation for the policy making process. One major goal of policy science is to define the policy problem as comprehensively as possible because incomplete policy problem definitions can preclude finding effective policy solutions (Clark 2002). Wagle (2000) views the work of contemporary policy scientists, who advocate a post-positivist approach, as having redefined the relationship between policy experts and citizens. This author argues that citizens hold information that is valuable to policy experts in the policy making process, and that their participation should be sought at all stages of this process--“from problem definition to policy choice” (Wagle 2000, 218). The notion that reality is

socially constructed (Berger and Luckman 1966) adds to the complexity of this process in that citizen participants may have differing conceptions of what the policy problem is and how it should be solved. Policy solutions, thus, may be only partially complete because of failure to take into account the variation in perceptions of the policy problem.

If policy science is to define the policy problem exhaustively, it must encompass the *context* within which the policy-making process operates (Clark 2000). The contextuality of a policy problem may yield insights about conflict management that would not be obvious without an understanding of the conditions—social, economic, administrative, legal, and political—that permeate the policy-making process.

From the policy sciences perspective, public participation is defined in this study as a ‘problem’ of public policy. As mentioned above, the messy, or ill-defined, policy problem is itself the problem. For the purposes of this study, the *policy problem* will be defined as that of crafting public participation that is viewed as legitimate and able to manage conflict by participants involved in planning the BAR project. This should not be confused with the *policy outcome* for which the public participated in this planning process which is the treatment of BNF land after the fires of 2000. This study does not address the perspectives of study participants as to the best way to treat the lands burned by the 2000 fires. The focus here is on how these participants define the policy problem of participation—that is, how legitimate and able to manage conflict they perceive the public participation process to be. Furthermore, variation in participant definitions of the concepts of legitimacy and conflict management may be due to their differing *expectations* of the process. Whether a participant’s expectations are met during the process of participation may contribute to their overall sense of legitimacy. For example, fulfillment of the expectation that the policy outcome can be influenced through

participation leads to increased legitimacy and decreased conflict (Susskind and Cruikshank 1987).

In answering the central questions of this study, it is necessary to define the policy problem (what constitutes legitimate participation that can manage conflict) through the perspectives of the participants, and identify the varying definitions of these concepts. This process is referred to as *problem clarification*. To help with this task, the following section summarizes a number of perspectives on public participation and conflict management in policy-making.

## **B. Theoretical Perspectives on Participation and Conflict in Policy-Making**

The connection between participation and conflict in public land management has been clarified in the work of Irland (1975), especially in his useful distinction between 'elusive harmony' and 'conflict management':

The goal of harmony is thus underlain by an implicit assumption that biological harmony of uses is paralleled by consensus among competing groups of resource users. That assumed harmony among user groups does not exist. How, then, can resource decisions be made, recognizing that any decision will leave some groups dissatisfied? I believe a philosophy of *conflict management*, rather than a search for an elusive harmony, holds a key to this dilemma (Irland 1975, p. 266, emphasis added).

Rather than seeking to achieve harmony, the management of conflict can be accomplished through public participation. Based in Irland's (1975) conception of public participation as a means of conflict management, this section compares and contrasts perspectives on conflict management through public participation within their respective decision-making models.



### ***B.1. Techno-Rational/Synoptic Perspective***

The techno-rational model has been described by Rossi (1997) as a process in which policy makers need to have high comprehension ability to understand the consequences of the problem and, therefore, to participate in the process of decision-making. Poisner (1996) summarizes the synoptic perspective as a model where professionals apply pre-set data in a scientific manner to come up with an optimal decision. Since expert scientists are the only individuals truly qualified to participate in the policy discussion and decision-making, the public is de facto excluded from substantive and meaningful influence on the policy outcome.

Because of the high reliance on technical information in the techno-rational/synoptic policy-making perspective, expert policy-makers strive to gather the most technically sound and methodologically rigorous data upon which to base their rational policy decisions (Poisner 1996). As a result, techno-rational policy experts leave the more value-based input of non-expert citizens out of the decision-making mix (Poisner 1996) preferring, instead, to address any perceived conflict as a problem of information flow or rationalization. Consequently, public participation during a policy-making process is often imbued with presentations of scientific data about consequences of various policy alternatives. Traditionally, this information flows from expert agency to lay citizen (Steelman and Ascher 1997).

Conflict also occurs in this model as citizens become adept at translating their value-based arguments into scientific data, fully expecting techno-rational decision-makers to use this information in constructing the policy outcome. The inevitable lack of responsiveness to citizen's information occurs due to what some theorists have dubbed "distorted communication" (Habermas 1984; Dryzek 1990; Fischer 1993 as cited in

Busenburg 1999). This distortion is created when dueling policy advocates, whether citizens or experts, use science as a weapon to advocate for a particular policy outcome. Meanwhile, as an 'information war' ensues, the value-based source of their positions becomes less discernable as scientific arguments are increasingly considered 'rhetoric' by the 'other side'.

### ***B.2. Pluralist/Preference Aggregation Perspective***

Pluralism is grounded in the assumption that individuals in society are essentially self-interested utility maximizers who, therefore, hold mutually exclusive interests (Dryzek 2000). Poisner (1996) summarizes the pluralist perspective on the individual nature of citizens and their participation in policy making through groups:

Although pluralists often emphasize group dynamics, an individualist assumption underlies pluralism. The pluralist sees groups as engaging in conflict; but the pluralist does not argue that group preferences have any meaning. Rather, groups are simply the means by which individuals collectively press their demands when their individual interests happen to converge (Poisner 1996, 81).

From the pluralistic perspective, the task of policy making is to decide the proper aggregative technique to 'add up' static preferences which result in the 'public interest,' although this term is relative. Because individual citizens participate in the policy making process with pre-determined and fixed preferences as the basis for their policy positions, public participation simply serves to add up these preferences, not necessarily change them (Dryzek 2000; Poisner 1996; Rossi 1997).

Often times this preference aggregation approach to public participation is administered in conjunction with the techno-rational model (Rossi 1997). After effectively aggregating the interests of the public, the policy maker has the opportunity to consult the 'public interest', compare it with the scientific data produced by the experts,

and make a decision. In this combination of perspectives the successfully aggregated 'public interest' is treated as a form of data and serves to supplement the technical analysis. In other cases, the aggregated 'public interest' is used as an indicator of which areas the public may need more information on in order to understand the expert's analysis.

Management of conflict, according to the pluralist model, is thus accomplished through a process of selecting or bargaining among pre-determined, mutually exclusive interests (Poisner 1996). From this perspective, conflict in the policy-making process is seen simply as a clash between individual preferences, whether expressed through groups or not. Therefore preference *formation* occurs exclusively outside of the auspices of the policy making process, and is an entirely private--not public--process (Poisner 1996).

In contrast, Daniels and Walker (2003) define conflict management from a slightly different pluralist perspective, including not only a plurality of values, but also the conditionality of those values.

This recognition that much of the potential for conflictual behavior flows from the conflictual nature of the situation [conditionality of values] echoes much of the prevailing thought among conflict management theorists. But it also raises significant question about the appropriateness of the term 'conflict resolution'...Consequently, the term "conflict management" is more consistent with pluralism than the more common "conflict resolution" (Daniels and Walker 2003, 7).

These authors define 'management' as a measure of three progress indicators, and prescribe participatory approaches for public participation to effectively manage conflict that is seen as "inevitable." The link between pluralism and participatory approaches is unique in the literature, and therefore differs from the preference aggregation definition in a way that has important implications for conflict management. Namely, it allows for the possibility that participants in the policy making process may change their preference

for a particular policy outcome through deliberation, which is not an option within the preference-aggregation model (Dryzek 2000). In the same vein, Daniels and Walker (2003) prescribe a collaborative process that emphasizes learning and transformative processes as goals of this participatory approach. This transformative aspect of collaborative/participatory approaches assumes that a participant's preference for a policy outcome can change as a result of the process of participation. This assumption is in sharp contrast to that of static preferences in the conception of pluralism from the preference-aggregation perspective.

### ***B.3. Deliberative Democratic/Civic Republican/Collaborative Perspective***

Dryzek (2000, 31) defines the deliberative perspective as unique compared to the pluralist/preference aggregation perspectives in one particular way: "that individuals participating in [deliberative] democratic processes are amenable to changing their minds and their preferences as a result of the reflection induced by deliberation." This fundamental distinction is also made by Poisner (1996) although he draws from the tenets of civic republicanism to illustrate this point. As synoptics seek to manage an information conflict and pluralists seek to manage an inevitable conflict between (pre-determined or not) interests, deliberative democrats and civic republicans seek to increase the opportunity for discourse that encourages reflection on preferences as induced through the process of deliberation (Dryzek 2000).

According to deliberation proponents, one aspect of conflict that occurs during the policy making process most likely results from competing discourses. Conflict management thus requires that policy makers focus on ensuring processes for deliberation that accommodate those discourses (Dryzek 2000) -- as opposed to

pluralism's focus on the management of pre-determined preferences through a process of bargaining (Poisner 1996), or the management of negotiations between interests that focus on mutual gains (Fisher and Ury 1991). Although the deliberative perspective is fundamentally different from pluralism in its allowance for transformative processes, viewed as managing conflict between competing discourses, deliberative proponents agree with some level of pluralism. Dryzek (2000, 3) specifically identifies this level while making a distinction between deliberative and discursive democracy: "*discursive democracy* should be *pluralistic* in embracing the necessity to communicate across difference without erasing difference" (emphasis added).

The collaborative perspective towards public participation and conflict management draws upon both the dispute resolution and deliberative democracy perspectives. Collaborative perspectives embrace basic tenets of the dispute resolution perspective such as creating options for mutual gains and focusing on common interests rather than positions (Fisher and Ury 1991; Wondolleck and Yaffee 2000). Further, the collaborative perspective assumes that it is possible to learn through the process and form relationships with those formerly thought of as adversaries (Kemmis 2001; Wondolleck and Yaffee 2000). These changes can be viewed as personal transformations (Poncelet 2001) and, according to the deliberative perspective, are accomplished as participants reflect upon their own preferences during the process of deliberation.

#### ***B.4. Power-Based Political/Strategic Perspective***

Whereas the three perspectives discussed above draw largely upon political theory, the power-based/strategic perspective on participation and conflict relies more heavily on contemporary studies of the influence of power on the policy making process.

Importantly, this perspective is evident in examples of power-based political influences on natural resource policy-making, particularly that of the Forest Service. As noted by Bingham (1986, 66): “In one view, the dynamics of social interactions arise from a fundamental conflict over the distribution of power between those who have power and those who do not.” Based on this view, social interaction during the process of affecting policy outcomes can be seen as a struggle for power. As Cortner and Moote (1996) add, politics, while often thought of as a dirty word, are simply a byproduct of this social interaction.

Using the Forest Service as an example, Wondolleck (1988, 65) refers to the decision making process that includes public participation as, “detailed, but straightforward...on paper”. However, “In practice the result is a very different and considerably more politicized process than that envisioned when the many different laws affecting natural forest management were envisioned”. The agency’s decisions tend to take into account much more than the technical, scientific information sought by technorationalists. Discussions of the failings of the techno-rational perspective often voice its connection with the power-based perspective. As one author notes, “technocracies of professional experts do not mix well with participatory citizen movements” (Grumbine 1992, 168). In other words, if technical data is ineffective in reflecting a citizen’s input into a decision, groups will seek out other modes of participation than those provided by the administrative process in order to gain power in affecting policy outcomes.

From this perspective, power-based participation is inherently pluralistic in that those seeking power seek it out for the express purpose of affecting the decision outcome to reflect their fixed preference. As a result, participants often place high emphasis on the policy outcome. In this sense power-based political participation is in contrast to the

deliberative model in that the opportunity for learning is forgone during the gaining of power to change the decision. Furthermore, conflict may be viewed as positive, and even necessary by citizens and groups hoping to bring up more fundamental issues than those addressed in the policy making process for a particular policy choice (Bingham 1986).

If a policy making process that includes public participation is viewed by participants as either (1) not affecting the policy outcome or (2) incapable of addressing the values and goals of an affected citizen or group, then citizens or groups may desire an escalated level of conflict as a means of gaining power. This power may be gained through political means or through the obfuscation of the administrator's intended purpose for the public participation process (Rossi 1997). If either of the two above perceptions is held by citizen or group participants, the process may simply devolve into a strategically oriented behavior (Rossi 1997; Wondolleck 1988). As Bingham (1986, 66) explains: "Depending on whether one represents the interests of the powerful, or of those who lack power, what is most important in any conflict [from this perspective] is to protect or to gain power." Conflict management, therefore, may be viewed from this perspective as a process of managing one's opponent in the power struggle. This struggle may manifest itself as the 'dueling scientists' phenomenon (characteristic of technological conflict management) where citizens or groups, in an effort to communicate in the language of technocracy, couch their arguments in scientific terms to get on an equal footing with the expert policy makers who ultimately make the decision (Busenberg 1999).

In summary, the theoretical perspectives discussed above illustrate the variation in conceptualizing public participation and conflict in policy-making. Although distinct in terms of their principal claims regarding the sources of conflict and its management,

some of these perspectives share common elements; that is, they are not necessarily mutually exclusive. Importantly, different perspectives may be held by citizens and administrators at different times in the policy-making process. Collectively, these perspectives provide a conceptual framework that will be utilized in identifying, comparing, and contrasting the perspectives on process legitimacy and conflict management expressed by the participants in this study.

### **C. Using the Perspectives of Policy Participants: Empirical Research**

The body of empirical research presented below examines participants' perspectives in defining the concepts of successful, effective, and legitimate public participation. This empirical work can be divided roughly into two sets of inquiries including: (1) what constitutes a legitimate public participation process (i.e., outcome oriented and process oriented perspectives) and (2) what do participants involved in public participation processes identify as barriers or challenges to legitimate public participation?

#### ***C.1. Perspectives on Legitimate Public Participation***

Generally, past studies have identified a duality in the way study participants describe a legitimate public participation process. This duality separates outcome from process indicators of legitimacy.



*C.1.1. Outcome Oriented Perspectives.* In a study of public perceptions of the Forest Service's public participation process, Germain et. al. (2001) gathered and presented their study participants perspectives; these included outcome equity, effectiveness, and efficiency. Similarly, in presenting the results of their investigation of how participants define successful participation, McCool and Guthrie (2001, 314) identify product and process-oriented measures of success within participants' perspectives. The outcome or product-oriented measures include, for example, "writing a plan, implementing it, and receiving social and political acceptability".

Smith and McDonough (2001, 239) utilized focus groups sampled from a those who participated in a planning process to help define "fairness in natural resource decision making." The results of their analysis generally point to the concept of legitimacy as an indicator of "fairness" in both how participants perceive the *process and outcome* of participation. Notably, these results illuminate a connection between the theoretical frame of justice and the perceptions of fairness on the part of public planning participants. Justice, like equity, can be considered a component of legitimacy.

The indicators of legitimacy identified in the above studies can be generally understood to contribute to participants' overall satisfaction with different aspects of the *policy outcome*. If participants feel that they have been heard, and that their input affected the policy outcome, they may be more likely to view the *policy process* as fair, effective, successful, and therefore legitimate.

*C.1.2 Process Oriented Perspectives on Legitimate Public Participation.*

Research examining the issue of what constitutes a "good" public participation process, conducted by Webler et al. (2001), identified legitimacy as one major indicator of a "good" process. McCool and Guthrie (2001) also identify a number of process oriented

indicators of what they term “success” such as learning, responsibility, relationship building, and interest representation. Collectively, these concepts all contribute to the idea of process legitimacy.

Mascarenhas and Scarce (2004, 35) have applied qualitative data analysis to 200 participant interviews and discuss the importance of legitimacy as a crucial component of success:

Lacking legitimacy, no attempt at consensus based decision making is likely to be embraced by diverse publics. However when the public identifies the outcome of a participatory process as representative, supported (as opposed to thwarted) throughout by participating government agencies, and consensus based, it is far more likely to be judged a ‘success’.

Importantly, process legitimacy clearly stands out in the literature as a concept crucial to participants’ definitions of effectiveness and success.

*C.1.3 Outcome-Process Links.* Empirical work aimed at defining successful participation has focused predominantly on the process, rather than outcome, of public participation. Nonetheless, the issue of legitimacy is applicable to both process and outcome oriented perspectives. The interrelated nature of policy process and outcome is evident in an investigation by Shepherd and Bowler (1997), who used a case study approach, into the relationship between procedural fulfillment of public participation and legitimacy. They identify as typical the perception among members of the public that the administering agency approaches public participation as a fulfillment of the requirements written in law, rather than a meaningful way to involve the public in affecting the policy outcome. These authors suggest that going beyond the legal requirements will not only accomplish the goal of effective process, but also improve the quality of the policy outcome. That is, a process that is viewed as legitimate by the participants can produce

good outcomes as well as reduce conflict (Shepherd and Bowler 1997). These results show the explicit connection between legitimacy and conflict management, and diminish the apparent duality between process and outcome oriented indicators of success. Shepherd and Bowler's work points out the tendency for much of the existing research to conceptualize process and outcome indicators of legitimacy as separate.

### ***C.2 Perspectives on Barriers to Legitimate Participation***

The majority of the research that addresses the context in which public participation happens focuses on the identification of barriers to legitimate participation that are a result of social and administrative systems as well as inadequate techniques (King et al. 1998). Similarly participant perspectives gathered by LaChappelle et.al (2003) point to the existence of procedural (inflexibility) and personal (lack of trust) barriers as well as others institutional in nature. McCool and Guthrie (2001) characterize their study participants as taking part in public participation in "messy" situations that are characterized by a number of situational attributes that combine to create a wicked problem incapable of simple resolution. They conclude with the idea that participant conceptions of success may be affected by "other contextualizing variables" (323). Busenburg (1999) compares two case studies to illustrate the link between the analysis process that includes public participation and, specifically, the political context's influence on the decision outcome. Furthermore, as Lewicki et al. (2003) found during their study of eight intractable cases of environmental conflict, a dispute that seemed tractable in one context became intractable in another, for example a seemingly resolvable conflict that first occurred at a local level was later intractable when elevated to a national one. There is little information as to why conflicts are tractable in one

context and intractable in another as few studies specifically connect the problem context within which public participation process occurs to the perceptions of the participants. Similarly, research has not thoroughly examined the association between participant's perspectives on process legitimacy and conflict management across a variety of participation modes from public meetings and written comment to appeals and litigation. Most prior research has not separated the process into its constituent parts.

#### **D. Summary of Rationale for the Study**

In sum, from the policy sciences perspective, incomplete problem definitions may preclude effective policy solutions, choices, or outcomes. The theoretical perspectives on participation and conflict are utilized as a framework for analysis of the context and study participants' perspectives. These conceptual tools are applied to analyze and discuss the findings of this study so as to more fully define the policy problem.

Although recent studies have relied on the perspectives of participants to define successful, effective and, thus, legitimate public participation, there is a general paucity of qualitative research that identifies "how participants define, in their own voices, 'good' or 'successful' planning processes" (Mascarenhas and Scarce 2004, 19). Accordingly, this study expands on existing work by (1) highlighting the different perspectives from which participants view the policy problem of legitimate public participation as a whole as well as across specific modes of public participation, and (2) investigating the contextual picture of the specific case of the BAR project. In so doing, this study addresses gaps in the knowledge base discussed above while responding to the

need for a greater number of case studies (Cortner et al. 2003) to facilitate comparisons that will enhance our understanding of specific and general factors influencing public participation in Forest Service project planning.

### III: DESIGN AND METHODOLOGY

#### A. The Sample

The study sample consisted of 11 participants selected from three interest groups: environmental, timber industry, and Forest Service. I selected them purposively based on several considerations.

First, study participants were chosen based on their participation in as many of the available public participation processes as possible. This was done in the interest of obtaining perspectives from study participants on as many modes of participation as possible—the more modes those interviewed had participated in, the more modes they could meaningfully speak to. It was also assumed that because these participants had taken part in a number of participation modes, they may have a greater understanding of the entire process. Ascertaining who participated, and how much, was done through an analysis of the official project file and snowball sampling. The information obtained via these methods and sources, showed that only a handful of *individuals* from the environmental community and timber industry had participated in more than a few modes of public participation for the planning of the BAR. The results of this two step inquiry limited the eligible pool of potential study participants to approximately five in the environmental and industry communities each. Forest Service study participants were identified using the same process although this inquiry was based more specifically on agency personnel's involvement with the design and administration of public participation for the BAR project. In sum, the names of those selected for inclusion in this study sample appeared frequently in the official project file and were repeatedly

mentioned by members when asked ‘who was involved in the public participation for the BAR from your interest group?’

Secondly, the groups mentioned above were chosen because the specific case of the planning of the BAR project was embedded within the broader political context of the ongoing National Forest management policy dispute. These communities have been active both in shaping policy through public participation and in the design of the modes of public participation for the planning of the BAR project.

Thirdly, the parties who ultimately settled the dispute through court ordered mediation included representatives from the environmental community, timber industry, and Forest Service. All of these parties participated in the mediation, having had a strong interest in the outcome. Members from these communities were chosen to participate in the study because they were highly involved in shaping the outcome of the BAR project through this and other modes of participation.

## **B. Study Design**

The design of this study is cross-sectional. The eligible pool of participants varied among the three groups sampled. The size of this eligible pool for industry and environmental group study participants was approximately 5 and 10 respectively. The eligible pool of agency participants was larger as the Forest Service has multiple levels of organization however this study sample pool was made up of mostly local Forest-level officials with one regional level study participant. The fact that not all eligible study participants responded to this researcher’s request for participation as well as the fact that

the eligible participant pools were small contributed to the fact that the number of study participants were not equal among the three groups. The numbers break down as follows: four participants from the environmental community; four participants from the Forest Service; three participants from the timber industry. Generally speaking, the interview data is used to supplement the study's policy and theoretical analysis and give individual voice to the most actively involved participants from these three groups. Regardless of the sample size's quantitative limitation, the in-depth and open-ended interview techniques used to gather the views of study participants are highly valuable in terms of their ability to allow for the individual words of the interviewees to define their views. Thus, the views of participants are seen as detailed and in-depth perspectives on public participation rather than positions in need of aggregation in some quantitative way. Not only was the analysis of interview data conducted with the intention of giving a voice to individuals within the communities, but it also examined the consistencies/discrepancies in perspectives of members within each group, and across the three groups. Common perspectives shared by all or by the majority of study participants from a particular group will not be interpreted as representative of the perspectives of the particular group as a whole.

### **C. Procedures and Data Collection**

This section describes the three major types of data and how they were collected for use in this study.



### ***C.1. Document Review***

The Bitterroot National Forest's official BAR project file was reviewed extensively. This file includes all official documentation used in the planning of the project. The file was housed in the Forest Supervisor's office in Hamilton, MT and contained in thirteen separate boxes. Search parameters included any documentation on the design, administration, communication, and facilitation of public participation for the BAR project. The review produced transcripts from meetings describing public participation design, internal memoranda, E-Mail communication, official public comment letters, descriptions of public meetings, mailing lists, media accounts of public participation modes, and other official documentation. The identification of eligible interview participants for the study was also accomplished partly through this review. No Freedom of Information Act request was obtained to access the file, as personnel at the Supervisor's office were amenable to all requests made for information, and made copies of all documentation as requested.

### ***C.2. Participant Interviews***

An initial round of interviews was conducted in the autumn of 2002. This first, exploratory round of interviews involved a purposive sampling of eight individuals who were asked a set of general questions regarding fire management (interview material from this round is used in the *Introduction*; citations of this material appear in the text as "Respondent #\_\_, 2002"). The results from this round of interviews guided the formulation of the interview questions used in this study.

The final form of the questionnaire used to collect interview data for this study includes semi-structured and open ended questions (Appendix A). Interview time length

ranged from one to three hours per interview. A total of approximately 20 hours of interview data was collected.

## **D. Data Analysis**

This section describes the analysis of the three types of data collected in this study.

### ***D.1. Legal Review Analysis***

The review of legal statutes, case law, and journal articles was accomplished to gain a better understanding of the specific legal context in which the public participation process for the planning of the BAR was administered. The results of this review were used in the background for this study, in the discussion of legal mandates for public participation, and a comparison with the modes administered by the BNF for the planning of the BAR.

### ***D.2. Government Document Review Analysis***

The analysis of the data that was produced from the review of the BNF's official project file for the BAR was accomplished through compiling and organizing these documents according to their relevance to a particular mode of public participation. This was done by arranging the documents chronologically, reflecting the order of the planning process for the BAR and its corresponding modes for public participation. This analysis produced results for each mode of participation, facilitated by the BNF, that

enriched the overall analyses by revealing two additional dimensions: (1) the BNF's design and intent for the particular mode of participation, and (2) the BNF's, official notification, public advertisement, and media account of the mode of participation.

### ***D.3. Participant Interview Analysis***

Recorded interview data was transcribed by the researcher verbatim to a computer word processing program, and subsequently stored on floppy disk. The transcribed interview data was later analyzed using standard content analysis procedures (See Berg 2001 for full discussion). Generally, the procedure included reading through all interview transcripts and creating a numerical 'code' for each idea that was expressed in an interview. This open-coding process (Berg, 2001) yielded copious amounts of information because every idea was given a numbered code. After the open coding of all transcripts, like ideas were grouped to create higher-order categories which, in turn, were organized under the most general groupings called themes. Because not all ideas were fully relevant to the central questions of this study, some coded information was set aside during the process. The result of this procedure was a summary of coded interview data resembling a typical Roman numeral outline. Particular letters and numbers in the outline could be referred to in order to identify the study participant who expressed a given idea. This outline thus facilitated the tracing of a particular idea to the study participant who expressed it, the comparison of the number of participants who expressed it, and the identification of the interest group they belonged to. This outline was then used as a basis for understanding the range of perspectives and where these perspectives differed and according to which variable (between interest groups, within interest groups).

## **IV: RESULTS AND DISCUSSION**

### **A. Statutory Mandates for Public Participation in Forest Service Planning**

The legal framework for public participation in Forest Service planning has been formally developed in response to federal statutes and regulations promulgated since 1970. Before these laws, public participation was mostly informal, although not totally absent (Culhane 1990; Fairfax, 1978; Kerwin 1997; Lawrence and Daniels 1996). The original ‘bare bones’ framework guiding public participation in administrative agency decision-making has been in place since the adoption of the Administrative Procedures Act (APA) during the pre-world war two era of New Deal government (Kerwin 1997). Since then landmark laws that govern Forest Service decision-making and planning processes such as the National Forest Management Act (NFMA) and National Environmental Policy Act (NEPA) have added layers of complexity to the relatively basic guidelines of the APA. These acts considerably altered the FS decision making and planning processes (Fairfax 1978; Solomon, et.al. 1997), one aspect of which was the demand for increased public involvement and review of agency decisions.

This section aims to answer the questions of ‘to what extent do the Acts and regulations give direction to the agency and how are they practically implemented’? However, there exists another question with regard to the implementation of these public participation requirements: is this participation effective—is the participation viewed as legitimate by those participating and does it manage conflict between the multiplicity of user groups which will be taken up directly in Section C of this Chapter. Section A shows that these are goals that are not mentioned explicitly in the legal language, however they are certainly important to the development of these democratic ideals.

This review identifies legal issues relevant to the administration of public participation in Forest Service planning and establishes a legal baseline from which to compare the modes of public participation administered by the BNF for the BAR project. This section begins by summarizing the original frameworks for public involvement mandated by law and regulations. It then turns to a brief discussion of the developments in public participation since the adoption of these mandates as a result of changing regulations, case law, and implementation and concludes with a discussion of the issues surrounding practical implementation of public participation in planning FS projects.

#### ***A. 1. The Administrative Procedures Act (APA)***

The APA of 1946 established a set of public “procedural rights” that all federal agencies must follow in administration of public policy and decision making (60 Stat. 237) and sets standards for judicial review of agency decisions. The act requires that administrative agency decisions must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or “without observance of procedure required by law” (60 Stat. 237). The act does not however require agencies to develop and implement specific processes for public participation besides the basic ‘notice and comment’ provisions discussed below, it does establish the expectation that all federal agencies observe established procedural requirements set out in applicable law (Solomon et al. 1997). The recognition of the “procedural rights” of citizens in federal agency decision making had not been established in law until the passage of the APA. Consequently, this act has served as a foundation for judicial review of agency procedure.

The public participation requirements set out in the APA have established a baseline for public participation in the process of administrative rulemaking. Although

the APA required that agencies give proper “notice” of the proposed rule through the Federal Register listing as well as opportunity for the public to “comment” on the proposed rule in writing, agencies had considerable discretion when designing public participation under the APA (Kerwin 1997). Furthermore, Kerwin (1997, 54) explains, “agencies were not instructed anywhere in the act to take heed of what they learned from the public in written comments, or whatever other form of participation they allowed.”

Public participation requirements as specifically required by the landmark Forest Service planning law NFMA and procedural law NEPA often act in concert with the APA. The APA essentially serves as an enforcement mechanism for the requirements of the NFMA and NEPA, both of which contain somewhat more specific, although still vague, instructions on how to involve the public in agency decisions. The courts have interpreted the APA’s enforcement language in a few standout cases to provide basic procedural rights as well as having honed in on the “arbitrary and capricious” test when evaluating agency decisions (See: *NRDC v. Securities and Exchange Commission*, 606 F.2<sup>nd</sup> 1031, 9 ELR 20367, 13 ERC 1321 [D.C. Cir. 1979]; *Citizens of Overton Park Inc. v. Volpe*, 401 U.S. 402 [1971]; and *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 [1983]). Indeed, as Solomon et al. (1997, 263) point out, “without the APA, early NEPA case law and CEQ regulations would not have evolved as they did in defining the scope of public participation requirements.” The APA’s test that agency decisions not be “arbitrary, capricious or an abuse of discretion” is often used during litigation in conjunction with the procedural requirements of NEPA—if the procedural requirements of NEPA are not met, then the agency may be acting in an arbitrary or capricious manner. This is one of two typical legal arguments made under NEPA (Coggins et al. 2002). Public participation, in this legal context, may sometimes adopt the procedural goal of

simply (or not so simply) meeting the letter of the law as vaguely described in the regulations and even less so in the act.

#### ***A. 2. The National Environmental Policy Act (NEPA)***

Although the focus of this section of the analysis of NEPA focuses on the procedural requirements for public participation in agency decision processes, it is important to note that debate still exists among legal scholars, the courts, and policy practitioners as to the relationship between the purpose (Section 101) and procedure (Section 102) of the National Environmental Policy Act (Culhane 1990). Proponents of a procedural reading of the act find that the action forcing provisions of NEPA are essentially the meat of the statute. One such reading occurred in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). The Court stated:

NEPA does not set forth significant substantive goals for the Nation, but its mandate to the agencies is *essentially procedural* (Emphasis added). It is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or this Court would have reached had they been members of the decision making unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

In this instance the court set a precedent that interpreted NEPA quite narrowly—as a set of procedures to be followed. Within this procedural framework resides the agency’s public participation program.

As with the APA, the task of interpreting the agency’s procedural compliance is difficult because neither the act nor the regulations are particularly insightful with regard to how to utilize public input. The lack of specific guidance in statute and regulations

combined with the court's interpretation has generally given the agency a fair amount of discretion (*Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 377 (1989)).

NEPA is *the* major legal framework that influences Forest Service decision making processes. The act aimed to accomplish three things:

First, it declared a comprehensive national policy for the environment modeled around notions of sustainability and ecosystem balance (Title I). Second, NEPA introduced the environmental impact statement (EIS) as a new *procedural tool* (emphasis added) for federal agencies to use in order to comply with the environmental policy. Third, the act established the Council on Environmental Quality (CEQ) to supervise NEPA's implementation by the executive branch and to monitor environmental quality (Title II) (Lindstrom 2000, 246).

As NEPA mandates substantive environmental goals that Lindstrom (2000, 246) characterizes as “sustainability and ecosystem balance,” or as it reads in the act: “productive and enjoyable harmony between man and his environment”, (42 U.S.C. Sec. 4321 (1976)) it's mechanism for achieving those goals is wholly procedural. Although difficult to separate the stated purpose and goals of Section 101 from the “action forcing” procedures set forth in Section 102, in practice NEPA is a set of steps—commonly referred to as “the NEPA process.” This process serves two primary public participation functions separate from fulfilling any overt policy goal: public disclosure (agency to public flow of information) and public input (public to agency flow of information).

The first function of the law is public disclosure. In other words NEPA fulfills a “larger informational role” (Tabb 1997, 1) in the planning process for any “major federal action significantly affecting the quality of the human environment” (42 U.S.C. Sec. 4332(2)(C)). The dissemination of information is intended to be accomplished through the publication of “detailed statements by the responsible official” disclosing, to sum it up, the environmental impact of the proposed action; adverse environmental effects; alternatives to the proposed action; etc. (42 U.S.C. Sec. 4332(2)(C)).



This disclosure of information is the foundation of the Environmental Impact Statement (EIS) although the language in the act simply instructs the agency that the documents and comments on those documents be “made available” to the President, the CEQ and the public (Fairfax 1978, 746). The slightly more concrete direction for implementing public participation is explained in the regulations created by the Council on Environmental Quality. These address the distribution of EIS’s and other methods of informing the public of proposed actions and their affects.

The following CEQ regulation addresses the dissemination of information to the public:

40 CFR 1500.1—Purpose. (b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and actions are taken...Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

Although still somewhat vague, this regulation makes clear that the agency should be actively attempting to inform the public up front, before decisions are made.

Additionally, public scrutiny is “essential” in fulfilling the procedural goals of the act, the goals of which can be accomplished through the disclosure of information to the public. More generally, 40 CFR Sec. 1506.6(b) instructs the agencies to “provide public notice of NEPA related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected” (Baldwin 2000). Again these regulations focus on a flow of information from the agency to the public, including in this latest example the mechanism of “notice” of hearings, meetings, and the availability of environmental documentation.

The second procedural goal of the NEPA as elaborated on in the CEQ regulations is to gather input from the public during the EIS process. However this procedural goal

is mentioned even less than the goal of information availability. Again, language in the act as to how to accomplish this public input function is vague. Only through a detailed reading of the CEQ regulations are the instructions to federal agencies apparent:

40 CFR 1500.2—Policy. (b) Implement procedures to make the NEPA process more useful to decision makers and the public...(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment...

40 CFR 1506.6—Public Involvement. (a) Make *diligent efforts* (emphasis added) to involve the public in preparing and implementing their NEPA procedures.

Due to the lack of specific guidance, the agencies essentially implement what they believe to be appropriate interpretations within these regulations and case law. The regulations do elaborate slightly on the timeline of individual stages of the NEPA process and the public's role in giving input:

1. Allow the public to help shape the content of the study by participating in scoping (40 CFR 1501.7(a)(1))
2. Give the public an opportunity to review the analysis and any underlying documents (40 CFR 1503.1(a)(4))
3. Require the agency to respond to public comments and make these comments available to the public in a final document (40 CFR 1503.4)

Here the regulations specify a three part process: first the public has opportunity for affecting the “content” of the study (EIS); second the public can review the EIS and then comment; and third the agency responds to the public's concerns—the information flow occurring from public to agency then back to public then back to agency.

These steps of the NEPA process are somewhat more specific than those identified in the APA, however many observers note that the agency possess a tremendous amount of discretion in implementing public participation under NEPA as well (Tabb 1997, 1)—the CEQ regulations simply “establish basic expectations and

procedures agencies must follow” (Solomon et al. 1997). Also important to note here is that while they are vague, there is no language in these regulations to limit the amount or type of public participation that the agency can undertake. The operative language stated in 40 CFR 1506.6 seems to encourage aggressive agency public involvement: the agency is to “make diligent efforts” to involve the public—what exactly this means has typically been a matter for the agency to decide unless reviewed by the courts. This matter will be discussed below.

### ***A.3. The National Forest Management Act (NFMA)***

NFMA requires the Forest Service to involve the public in planning and decision making regardless of whether the proposed action would significantly affect the quality of the human environment (Lawrence and Daniels 1996). However, a considerable amount of evidence indicated that the Forest Service’s management practices were indeed having significant effects on the quality of the human environment. The Forest Service, it was thought, needed to better coordinate their planning processes for individual actions on the forest. With this in mind, the Congress codified into law a comprehensive planning process for the agency, the basis of which was the creation of coordinated planning documents for each forest in the National Forest system. The public was to be involved in the creation of these plans.

The NFMA was seminal in its emphasis on, among other things, the creation of Land and Resource Management Plans (LRMP), or more commonly known simply as “Forest Plans.” Through a number of different evaluations, inventorying, and essentially zoning procedures, the Forest Service was to create, adopt, and follow as law a comprehensive Forest Plan on each individual forest in the National Forest System.

These overarching plans were meant to serve as guiding documents for project level planning and decision-making (Coggins et al. 2002), and in this sense each embodied some degree of substantive management goals.

The procedure used to accomplish the creation of the forest plan as well as the projects intended to implement the substantive goals set out in these plans was to include public participation. Although participation was to be an integral part of the LRMP planning process, the details of exactly how the agency was to accomplish this did not appear to be forthcoming in the language of the law. Coggins et al. (2002, 722) note that “the first step towards fully implementing NFMA was for the Forest Service to develop detailed regulations.” Out of these regulations flowed the agency’s guidelines for public participation in the planning process for forest plans. Additionally, the NFMA forest planning process was to be implemented following a complimentary set of procedures set forth under the National Environmental Policy Act. The regulations specify that “to the extent feasible, a single process shall be used to meet planning and NEPA requirements” (36 C.F.R. sec. 219.12(a) (1991)). As a result, the procedure for the NFMA planning process largely takes place through NEPA procedure. These procedures provided for another layer of participation in the process of planning forest plans as well as projects.

As the NFMA established a set of substantive goals for Forest Service planning and was also implemented through NEPA procedures, the courts have been an integral player in the process of interpreting the statute. In the case of perceived non-compliance by citizens and other organizations (i.e. ‘the public’), the tenets of the statute could be enforced through litigation. A full discussion of NFMA case law is beyond the scope of this study, however. Important to note here is that the NFMA was now a basis for judicial review of Forest Service actions, not simply a mechanism for helping the agency

achieve its multiple use mandate. As Charles Wilkinson writes: “The NFMA will require courts to scrutinize forest plans, and activities based on those plans, on both procedural and substantive grounds” (Wilkinson as cited in Coggins et al. 2002). Congressional intent in the passing of NFMA, while somewhat difficult to interpret, reveals a concerted effort to keep the Forest Service in check through the threat of judicial oversight, as well as forcing certain specific actions through procedure.

***A.4. Discussion: Public Participation for Planning and Decision Making Under the Forest Service—Highly Procedural and Certainly Rational...But is it Meaningful?***

The democratic ideal of directly involving the public in governmental decision-making increased in popularity during the 1960’s and 70’s as the concept was codified into law (Lawrence and Daniels 1996). Being a basic tenet of popular sovereignty and a foundation of democratic governance, public participation theoretically ensures that administrative actions be responsive to the public that they serve. Although the APA provides for some level of disclosure of information and opportunity for public comment on that information, it does not specify how that returning public input is to be considered. The specific laws governing Forest Service public participation give little to no further guidance on the subject. These specific mandates for public involvement in FS decision making and planning processes came in conjunction with more substantive mandates regarding comprehensive planning (NFMA) and consideration of environmental values (NEPA). These ostensibly substantive mandates have been interpreted by the courts as largely procedural with some exceptions. One basic function of these Congressional mandates is clear though: FS decision-making and planning was to involve diligent efforts to involve the public.

Regardless of the lack of clarity with regard to the substantive aspects of these acts, their *procedures* for involving the public are clear and are viewed as a valuable aspect of the law to many observers (Baldwin 2000). However, the issue of whether these mandates were successful at accomplishing the purposes for which they were intended, and what exactly these intentions were, remains an area of considerable debate.

Particularly, the question still remains as to how these mandates have influenced the behavior of federal agencies, specifically the Forest Service. At the time of passage of legislation mandating public participation, agencies were thought to be subject to “capture” by a narrow sector of private, economic interests—their behavior seen as counter to the “public interest” (Fairfax 1978; Lawrence and Daniels 1996). As the cozy relationship between the FS and timber interests guaranteed a point of access to agency decision processes, public interest groups of the 1970’s viewed the landmark laws mandating public participation as their ‘in’ (Reich 1962 as cited in Culhane 1990). The Forest Service, according to Culhane (1990, 168), also hoped that the formal involvement of other groups or “publics”, such as recreationists and conservationists, would “counterbalance industry dominant-use demands within forest planning processes.”

Some observers of this issue make the case that the NFMA and NEPA were not successful at revolutionizing management of National Forests. Behan (1990) makes the argument that the NFMA constituted a solution to a non-existent problem—that elaborate planning requirements were not the proper solution to the problem of agency capture. Fairfax (1978) questions the effectiveness of the NEPA in bringing about the change that most can agree it was intended for: to make better decisions. Ironically, she claims, it above all resulted in tremendous amounts of paperwork for agencies and environmentalists as opposed to improving decision-making.

One thing is clear though; Congress and the regulations created under their mandates aimed to create a process that would both utilize public participation and generally improve agency decisions. A passage in the NEPA regulations reflects part of this intention: “ultimately, of course it is not better documents but better decisions that count” (40 C.F.R. Sec. 1502.5). Public participation was conceived as an integral aspect of this aim to improve agency decisions however it is difficult to interpret how the public’s input is to be used.

It also appears that all three of these statutes discussed above were intended, to some degree, to keep the agency in check through the threat of judicial oversight. As the case law has accrued, the courts have given the agency a tremendous amount of discretion by requiring them to provide only a sufficient amount of *reasoning* in the defense of a decision. The courts have also failed to provide the agency with a meaningful legal standard by which public input can be judged to have affected the decision. Legally defending the “hard look” (Coggins et. al. 2002) that the courts require of agencies then becomes a matter of rationalization—the agency must simply provide a reasonable rationale for the decision while providing voluminous amounts of ‘proof’ that they have taken a hard look at the decision and as well simply *considered* the input of the public. With this in mind, if the agency is able to show that it has made its decision without being arbitrary or capricious, that is being logical and reasonable, it should be able to withstand the test of judicial review. Partly as a result of this dynamic between agency and judiciary can agencies “use” public input to rationalize their decision, one way or another. Agency’s can use public input to support their decision, or, they can use the input as a basis for providing a reasonable explanation why it was not incorporated into the plan—they effectively deny the public’s input meaningful influence while legally

rationalizing their decision and maintaining discretion not only over the procedural aspects of the process but the decision-making power as well. All they must do according to the regulations is 'respond' to public comments in specific ways that will be touched on in the following section. In the event that they are reviewed by the courts they have already created a reasonable explanation, backed up by the voluminous information in the official administrative record including public comment and responses, for why the input was not incorporated into the plan. In fact, the entire process of planning a project, or more generally rulemaking, as Cornelius Kerwin (1999, 72) explains, is often imbued with a legalistic flavor:

Information requirements and the intensity provided by public participation, particularly when information in the record is challenged [or the agency thinks it will be challenged] and agency witnesses are cross-examined, has gone so far as to transform some rulemakings into quasi-judicial proceedings.

This rational and reasonable approach required of agency decisions by the courts has resulted in confusion as to what the public participation process is used for. On the one hand, the agency must simply consult the public and provide a reasonable explanation why their input was used or not. On the other hand, the public oftentimes expects what the law may imply: some level of democracy and resultant power in the decision process. Some observers posit that the confusion occurs in large part because the NEPA process is administered within a techno-rational and synoptic planning model (Poisner 1996). As the public expects more from the process, namely that their input will affect the decision, the agency operates within the realm of scientific rationality, simply reasoning their way through the decision process. This often instills in the public the perception that the agency is unresponsive. However this perception of unresponsiveness may be rooted in a simple lack of common understanding. As Steelman and Asher



(1997, 74) note, "Confusion results when public input is solicited by bureaucrats without much regard for the function it is to play in developing policy." Alternatively and according to this legal analysis, this confusion may not be simply occurring between the agency and public, but rather is a by-product of a number of factors that result in a general struggle among political actors as to what role public input is to play.

Agencies implement public participation in different ways for a few reasons. Simplistic legal regulations and lax judicial oversight allow for 'the process' to be tweaked to a degree at the project planning level. However, changes to the public participation process also occur at higher levels of government during the writing and re-writing of federal regulations governing the use of participation in the planning of Forest Service projects, often under the auspices of a newly elected executive branch. Generally, agency planners and executive administrations continually re-invent public participation programs and regulations through project implementation and the administrative rulemaking process while maintaining the baseline level of involvement required by law. Also influencing the implementation of the process are interest groups. The propensity for these "open-ended" participation mandates to be subject to implementation pressures from groups that "read their pet ideas into the NEPA process" (Culhane 688, 1990) is an ongoing issue. In sum, the pressures placed on the process come from multiple sectors of the government and public and influence the implementation of the public participation requirements of the laws. These pressures are most often exerted by the executive branch, agency, and interest groups. In this sense, the policy problem surrounding implementing public participation is continually re-defined by these actors involved in the policy-making process. Often times, attempting

to define the procedural problem of participation is done in a way that will enable these actors to further their substantive policy interests (Steelman and Ascher 1997).

The courts have not only required a reasonable explanation for decisions, but also have never really limited *the amount* of participation that agencies can adopt. However, *the type* of participation sought after by agencies is limited with respect to the use of advisory groups. The main intention of the Federal Advisory Committee Act (FACA) was to temper special interest influence that ‘advisory groups’ selected by agencies may have on decisions. Because, it was thought, that these advisory groups may be comprised of a narrow range of interests, the law provides guidelines for their use and formation that assure that a proper cross-section of interests are represented. How the law exactly limits the use of advisory groups is a question of concern to the development of public participation for Forest Service planning in particular. Croley (1996) explains the current uncertainty with regard to the laws applicability:

Because the FACA itself does not clearly delineate its scope, because the courts have at times taken seemingly different approaches to its applicability, and because agencies themselves take different position with respect to the FACA’s application, agency personnel remain somewhat uncertain about exactly what kinds of agency conduct trigger the Act.

It is within this realm of uncertainty that the Forest Service operates with regard to the assemblage and utilization of committees made up of members of the public. The FACA is often cited by Forest Service personnel as a barrier to the utilization of public input from citizen groups during project planning processes. While advisory councils have been used to varying degrees by agencies such as the Bureau of Land Management, the Forest Service has failed to adopt the advisory council language in the NFMA. A little known and seemingly obscure passage within the context of the current FS public participation debate, section 1612 of the NFMA advises the secretary of agriculture to

create advisory panels as a public participation technique to aid in forest planning. The passage states:

In providing for public participation in the planning for and management of the National Forest System, the Secretary, pursuant to the Federal Advisory Committee Act (86 Stat. 770) and other applicable law, shall establish and consult advisory boards as he deems necessary to secure full information and advice [...]. The membership of such boards shall be a cross-section of groups interested in the planning for and management of the National Forest System. (16 U.S.C. Sec. 1612(b))

This passage of the NFMA not only encourages participation but actually gives the agency specific guidance on the formation of a representative group of interested advisors. Why this specific direction given to the Forest Service has not been utilized is unknown. Although this passage is specific about how to form such a group, it again does not provide guidelines for their use in terms of the amount of decision-making power they are to have and more generally how their input is to be used.

In sum, the lack of clear legal guidance as to how participation is to be used, that the laws mandating participation have been enforced to be only procedural, that a dynamic exists between agency and judiciary and has resulted in a high level of reliance on rationalization of decisions, and that the executive agency and interest groups continually attempt to define the problem of participation in their own way collectively create a challenging legal context for *meaningful* public participation.

Although this section has sketched out the legal context that public participation operates within, it is apparent that there exists another question that is generally not addressed in the legal language: is this participation effective—is the participation viewed as legitimate by those participating and does it manage the conflict between the multiplicity of user groups? Although these goals are not mentioned explicitly so as to provide clarity to the agencies, as discussed above, there is enough reason to believe that

the intent on the part of the Congress while inserting language that instructs the agency to “make diligent efforts” was to involve the public meaningfully in the planning efforts of agencies. Although confusion still exists, the venue for sorting out the lingering substantive questions about National Forest management will continue to include the project level planning process. Consequently, the designing of public participation processes that go beyond the requirements is certainly important to the continued development of these democratic ideals. As Shepherd and Bowler (1997) surmise:

Public participation programs need not be held hostage to a myopic view of EIA [Environmental Impact Assessment]. That is, even though NEPA imposes essentially procedural requirements on project proponents, we suggest that substantive public involvement that goes beyond the requirements can benefit the parties involved and the final outcome.

Next this investigation turns to a review of the official project file for the BAR project. The following section will shed light on a number of questions about the public participation process for the BAR. However the question most relevant to the above discussion, and perhaps the easiest to answer, is ‘What did the BNF actually do in the way of public participation and was it simply procedural?’

## **B. A Chronology of Modes of Public Participation Administered by the BNF for the Planning of the Burned Area Recovery Project**

The planning of the Bitterroot National Forest’s BAR project involved a number of separate processes, or *modes*, for public participation. The following section describes the information compiled from the official project file for the BAR regarding public participation. Each official stage of the public participation process administered by the

BNF is enumerated below in chronological order. Described under each mode are the following: (1) a summary of the information compiled from the file on the purpose, goals, and design of that particular mode, and (2) a summary of the information compiled from the file regarding the mode's advertisement, public notice, and media coverage. This review will show how the modes administered for the BAR compare to the legal requirements outlined in Section A as well as elucidate trends about the public participation process from the official documentation.

### ***B.1. "Community Opportunity Series"—An Innovative Mode***

*B.1.1 Purpose, Goals, and Design.* On October 6, 2000, Chris Love Associates—Consultants For Positive Change presented the BNF with "A Proposal for the Community Engagement Program for the Bitterroot National Forest 2000 Fire Situation Analysis" (BAR File 2000). This proposal identifies several basic questions that the Community Engagement Program (CEP) was designed to help answer:

- "From a resource and social standpoint, what happened during the fires of 2000?
  - What are the resulting needs and opportunities?
  - What should the priorities be for action?"
- (BAR File 2000).

The CEP's goals as stated in the proposal are as follows:

"Create an opportunity for the Bitterroot Valley community to give input into the direction and content of the Fire Situation Analysis...and *enhance positive interaction between members of the FS and the community that occurred during the fire period*" (BAR File 2000, emphasis added).

The BNF used this template to administer the "Community Opportunity Series: Learning from the Fires of 2000" in the form of two separate series of six meetings each. The first series followed a more informal "Community Conversation" format. Attendees were encouraged to bring desserts and chat with other community members informally

and in a relaxed atmosphere prior to the start of the more formal proceedings during which the public was asked about the specific questions as stated in the purpose of the CEP proposal above. Per the guidance of the CEP proposal, after the first series the BNF was to evaluate and “de-brief” the meetings “to determine specific objectives of the other two or three conversations” to be held in the same locations a few weeks later (BAR File 2000).

The second series of six meetings were “developed in response to suggestions made during the first meeting series” and were called “Community Open Houses” (BAR File 2000). These meetings took on a slightly more traditional format in that the BNF was presenting information that had been requested by the public in the first round of meetings. The purpose of this second round of meetings is summarized in the document “Bitterroot Fires 2000: An Assessment of Post-Fire Conditions with Recovery Recommendations” which will hereby be referred to as the “Post-Fire Assessment”:

The Forest Service provided updates on the recovery efforts, with particular focus on needs, opportunities, and information requested by Valley citizens. The Forest Service collected additional input in the form of needs, opportunities, suggestions and requests for information. *These requests also shaped this report* (emphasis added). In general, the suggestions and concerns collected during round two did not differ significantly from that discussed during round one (BNF Post-Fire 2001).

Section 3 of the Post Fire Assessment also summarizes the “needs opportunities and suggestions” that were expressed in the Community Opportunity Series meetings. This summary of issues, as stated above in the italicized text, had some level of influence on the content of the report although the details of which are unclear.

In a *Ravalli Republic* article published around the time of the release of the Post-Fire Assessment, Nan Christianson, then Stevensville District Ranger and member of the BNF’s Fire Recovery Team, alludes to the atypical nature of the “Community

Conversation and Open House” formats as she describes them as “a break from business as usual” (BAR File 2000). Christianson again states the BNF’s desire to create a different relationship with the public while describing this new format for public meetings in a *Missoula Independent* article, noting: “The public process is not that satisfying” (BAR File 2000).

Is it possible  
or is it not?  
missoula?

*B.1.2 Advertisement, Public Notice, and Media Coverage.* The first rounds of Community Conversations were to be advertised to the public through press releases. The message in the press releases was consistent with the goals provided by the consultant’s proposal for the CEP: “The BNF is reaching out to individual communities in a continuing effort to maintain an open communication that was created during the fires” (BAR File 2000). A piece of documentation in the project file titled “Fire Response Communication Update” indicates that an effort was made on October 10, 2000 to purchase advertising space in the local newspapers to inform citizens of the upcoming first round of meetings. The newspapers were unable to place the advertisement before the meeting series would begin and so consequently the BNF chose to place the add using flyers to be posted in public places in the communities where meetings would be held. The BNF also made phone calls to community members hoping to encourage their participation in the meetings (BAR File 2000).

The second round of the “Community Opportunity Series” was more aggressively advertised in the *Ravalli Republic*, *Missoulain*, and *Bitterroot Star* during the final week of October 2000. (BAR File 2000). The BNF’s press releases generally encourage the public to participate while continuing to emphasize that “the community series is an essential component in ensuring that residents are engaged in the planning...” while also summarizing the first series as having “generated a lot of really great interaction” (BAR

File 2000). A more streamlined version of this public notice is documented as having been published in the Missoulian during the last few days of October, 2000:

“Fire Recovery: Your Ideas and Concerns Do Matter! We have worked together to identify the needs and opportunities that should be addressed as we work towards fire recovery. Please join us, we would like to share this information and provide answers to your questions” (BAR File 2000).

The above summary is the earliest documented evidence in the project file of the BNF’s formal efforts to involve the public in post-fire recovery planning.

## ***B.2 The Social Survey—Another Innovative Mode***

The majority of the documentation of the design, administration, and use of the Social Survey can be found in the executive summary of the social survey results and the Post-Fire Assessment. Other than these documents, there is little specific information in the project file.

*B.2.1 Purpose, Goals, and Design.* In December of 2000 the BNF commissioned the University of Montana’s Bureau of Business and Economic Research to conduct a telephone survey of Ravalli County residents. The report “represents the attitudes and opinions of Bitterroot Valley residents about managing the forests after the 2000 fires” (U of M 2001).

The social survey’s stated goal was “to learn the opinions of a true cross section of valley residents. Persons testifying at public meetings, writing letters to the Op-ed pages of local newspapers, or calling the various “hotlines” may not be representative of the entire population” (U of M 2001). The methodology section of the report also refers to the design of the questions and survey instrument:

The questionnaire was constructed according to accepted principles and guidelines of survey research. The Bitterroot National Forest provided the topics and some draft questions. A preliminary questionnaire was written



by the Bureau and the reviewed by the USDA Forest Service. A pretest of the questionnaire was conducted on December 2000, and a few minor features were modified (U of M 2001)

Additionally, the methodology section explains the sample size and distribution within Ravalli County:

A total of 1,214 interviews were completed, with an overall response rate of eighty seven percent. In order to facilitate comparisons and identify differences within the valley, these 1214 interviews were conducted so that there were at least 400 completions from the north, central and southern portions of the valley (U of M 2001).

*B.2.2 Advertisement, Public Notice, and Media Coverage.* The social survey was conducted by “the bureau’s cadre of experienced telephone interviewers” (U of M 2001). Public notice for this mode of participation was accomplished through the media although the goal of this coverage seems to be intended not as a solicitation to participate but more as a way to inform the public that the survey was to be conducted. Three articles ran in three separate publications describing the goals of the survey, the time frame in which it would be conducted and a discussion of how the results would be used.

An article that appeared in the *Missoulian* touches on these issues. Tami Brewer, BNF Public Affairs specialist describes how the results will be used “in future planning efforts and priority setting,” as well as gathering information with regard to “what are the best ways to reach people and what are the things they want from us” (BAR File 2000). Brewer continues by describing the survey as “part of the Forest Service’s effort to keep information flowing and public participation high” as “the summer fires season brought people into the public process who in the past hadn’t participated” (BAR File 2000).

A piece in the *Ravalli Republic* relays similar ideas regarding the purpose and use of the survey. “Forest officials say they want to know how people were affected by the 2000 fire season and how the forest can respond and plan for the future [and] they want

to know what management actions residents would like them to take” (BAR File 2000). There is further evidence in this piece of the BNF’s belief that the survey is an attempt to involve the public in a different way. Dixie Dies, Public affairs officer for the BNF, describes the difference between this form of public participation and other more traditional modes: “Forest Service meetings always draw people from both ends of an issue, yet many people’s interest lies somewhere in the middle” (BAR File 2000). This statement indicates that the BNF once again considered the survey to be an innovative way to involve the public due to it’s ability to gather input from a sector of the public that does normally not participate in planning projects.

### ***B.3 The Publication of the Post-Fire Assessment-NFMA Public Participation***

*B.3.1 Purpose, Goals, and Design.* The introduction to Bitterroot Fires 2000: An Assessment of Post-Fire Conditions with Recovery Recommendations describes the procedure for the report:

This assessment evaluates current resources in their historic context and in view of current legal and managerial direction. This document does not make decisions. It identifies management options in the wake of the 2000 fire event and recommends a program of recovery work in the next few years. The recommendations are based on current information and public input during the fall, 2000 (BNF Post Fire 2001).

The introduction also identifies public participation in relation to one of its three main objectives:

Identify social and resource risks, recovery needs, and resource improvement opportunities. To date, we’ve hosted twelve community and Forest Service listening and learning sessions to better define what issues we should evaluate, provide an opportunity for people to express their preferences and concerns regarding recovery work, and to share information that the assessment team assembled (BNF Post Fire 2001).

The above is the most detailed description of how public input contributed to the Post Fire Assessment. Missing in this document is a clear and measurable description of what influence the summary of public preferences and concerns collected in the Community Learning Series public had on the recommendations made in the Post-Fire Assessment.

*B.3.2 Advertisement, Public Notice, and Media Coverage.* In a *Missoulian* article, Rodd Richardson, then BNF Forest Supervisor discusses the purpose of the Post Fire Assessment. As well as simply putting figures on the effects of the Fires of 2000 such as total National Forest acres burned, for example, Richardson describes the report as both “a comprehensive look at the big picture,” and “one that will recommend what to do over the next three to five years” (BAR File 2000). The article goes on to describe some of the report’s recommendations and funding requests as well as the Forest’s efforts and goals in collecting public input. “After weeks of collecting public comment in surveys and at neighborhood meetings, Richardson said he hopes forest officials can craft proposals that gain public acceptance. ‘Hopefully we’ve set the stage by listening well going into this,’ he said” (BAR File 2000).

#### ***B.4 Scoping for the BAR Environmental Impact Statement—NEPA Process Begins***

Following the “Community Opportunity Series” of public meetings, the administration of the social survey, and the release of the Post-Fire Assessment in January, the traditional NEPA process began. According to the official file, the project’s interdisciplinary team of resource scientists and specialists began to hold meetings at this point. As the public participation process to this point in time had largely been a process of soliciting general input from the public, the NEPA scoping process is the first

opportunity for the public to actually respond to a set of proposed actions that have been created by the agency.

*B.4.1 Purpose, Goals, and Design.* The ID team notes from January 8, 2001 describe some of the purpose and goals of the scoping process for the BAR project:

Scoping incorporates all the efforts to identify issues and opportunities. The Post-Fire Assessment and community survey will provide important background information. We need to involve other agencies and Tribes early prior to developing proposed action. Formal public involvement needs to continue with the publication of the NOI, mailing notices, and response to comments in the DEIS. Continue the less formal community meeting format to discuss the proposed action and alternatives. Use “demonstration” or “example” sites to host field reviews next spring” (BAR File 2000).

As stated above in the ID team notes, the Social Survey and CEP series were to be used as “background information” for scoping. The priorities gathered from the public through these modes would be used to create a proposed action. This in turn would be released for the purpose of getting feedback and responses from the public during the official scoping process. Again, the extent to which the Post-Fire assessment and Social Survey information were used in the creation of the proposed action is unclear based on the information available in the project file. Evident though in the above excerpt taken from the ID team notes is the BNF’s intention of making both formal and informal modes of participation available throughout the development of the BAR DEIS.

The BNF held four public scoping meetings between February 12 and 19, 2001 in Sula, Darby, Hamilton, and West Fork. These meetings were formal public meetings where comments were taken both orally and written and were considered official. The Notice Of Intent (NOI) to prepare an EIS, the action that officially triggers the NEPA process, was published in the Federal Register on February 16, 2001. Other actions taken by the BNF included mailing the Post-Fire Assessment and EIS briefing to a list of

interested parties, participating in face to face meetings with other agencies, organizations, and interested community members, and accepting written scoping comments on the proposed action (BAR File 2000).

ID team meeting notes indicate that a schedule was created for the drafting of the EIS that gave ID team members approximately 30 days to finalize a proposed action that could be mapped and described to the public. During this time alternatives were developed “concurrently with public meetings” for publication in the DEIS (BAR File 2000).

*B.4.2 Advertisement, Public Notice, and Media Coverage.* Certain interested members of the public are informed by mail, on a quarterly basis, of the BNF’s intentions to create projects. This publication is informally called the “NEPA Quarterly.” Existing mailing lists were combined with names of people who had attended public meetings pre-scoping, as well as names of other interested organizations, businesses, and agencies compiled by BNF officials to form a master mailing list that was created for the BAR scoping process (BAR File 2000). The letter accompanying the scoping material sent to this list of recipients addresses the reader as “Dear National Forest Shareholder” and is signed by the former Forest Supervisor. Richardson describes the information accompanying the letter and it’s relevance to this stage of the planning process:

The enclosed assessment identifies priorities for fire recovery on the BNF. From the assessment we have identified specific proposals that will be analyzed in the BAR EIS. I have included a briefing paper on the EIS. The EIS will analyze the benefits and impacts of our proposals to reduce fuels, improve watershed conditions, and replant burned lands (BAR File 2000).

Scoping letters were mailed to approximately 1,500 recipients and in addition to the above mentioned information included public meeting times and locations. Concurrently,

press releases describing the upcoming public scoping meetings were faxed to media outlets (BAR File 2000).

An article in the *Missoulian* describes the recommendations of the Post-Fire Assessment which became the basis for the proposed action to be ‘scoped’ by the BNF. “Bitterroot National Forest Officials said Tuesday they’ll look first at logging 60,000 acres of standing dead trees and re-planting 24,000 acres of severely burned ground—mostly in areas of the forest near to homes and communities (BAR File 2000). The article goes on to describe times and locations for the public scoping meetings to be held in the Bitterroot Valley.

#### ***B.5 The Publication of the BAR Draft Environmental Impact Statement***

Public participation used in the scoping process attempts to gather all the relevant issues from the public, other agencies, organizations, etc., that were submitted in response to the agency’s proposed action. This “issue identification” process is used to form alternative courses of action, or simply ‘alternatives’ for publication in the DEIS. These alternatives are to be weighed against each other in the analysis process.

*B.5.1 Purpose, Goals, and Design.* The release of the DEIS triggers another round of public meetings, field trips, and opportunity to submit official written comment on the analysis and alternatives studied in the DEIS. This step in the analysis process uses public participation to help redefine the alternatives being studied for publication in the Final EIS and subsequent Record of Decision. Official public comments gathered through public meetings, field trips, and written letters were analyzed by a content analysis team and passed on to the ID team and Responsible Official for the project for use in their FEIS analysis. In a July 3, 2001 ID Team meeting, Chris Wall from the

Missoula Content Analysis Team, “briefed the team on the process of content analysis and the basics of responding to comments [and] the first list of public comments was handed out to team members” (BAR File 2000).

Two Public meetings for the DEIS comment period were held in Darby and in Hamilton. ID team meeting notes mention the BNF’s intent to develop a power point presentation for use in public meetings (BAR File 2000). Furthermore, the majority of one ID team meeting was dedicated to discussing the design and format of the public meetings and field trips (BAR File 2000). Additional time was spent in subsequent ID Team meetings in preparation for the public meetings and field trips (BAR File 2000).

*B.5.2 Advertisement, Public Notice, and Media Coverage.* The DEIS was released to the public on May 24, 2001, although the official notarized legal notice was not placed in the BNF’s paper of record, the *Ravalli Republic*, until June 1, 2001. The legal notice describes the DEIS briefly as having studied “five management alternatives for the area burned by fires of 2000 on the BNF,” as well as directing those members of the public with interest to request further information from the forest Supervisor’s office and giving notice of the deadline for comments to be postmarked by: July 16, 2001 (BAR File 2000). Instructions as to what comments should include are as follows: “(1) name, address, telephone number, organization represented, if any; (2) title of the document on which the comment is being submitted; and (3) specific facts supporting reasons for the Responsible Official to consider” (BAR File 2000).

DEIS  
↓  
Sathern

A letter signed by former supervisor Richardson was mailed to the project mailing list notifying the “interested party” of the DEIS’ availability (BAR File 2000). Two different forms of the DEIS were made available upon request: a 30 page summary or the full 900 page DEIS. In the letter, Richardson specifically addresses when written

comments will be used: “I will consider your comments submitted during the DEIS comment period *prior* to making a final decision on this project” (BAR File 2000; emphasis added). Richardson goes on to explain his own position on the development and implementation of the project:

I believe it is appropriate to implement active management in the burned area in order to help achieve the purpose and need for the proposal [...] However, I have not decided which of the action alternatives is preferred. At the present time I am leaning toward implementing activities in the range between Alternatives D and E. Because of the urgent nature of this work, I may seek alternative NEPA arrangements with the Council on Environmental Quality to implement portions of the project. In addition, assuming an action alternative is selected, I may seek an exemption from the automatic administrative stay in order to implement certain work necessary to allow activities to occur during the winter (BAR File 2000).

The DEIS letter also describes two public meeting dates and times to be held in Darby and Hamilton as well as two separate field trips to Waugh Gulch and Cow Creek demonstration sites. The former Forest Supervisor ends the letter with this tag: “I look forward to your comments on the Burned Area Recovery DEIS” (BAR File 2000).

The project file also contains record of a press release created by the BNF to advertise the availability of the DEIS. The release describes opportunity for written public comment as well as the dates, times, and locations for the associated public meetings and field trips mentioned above. Supervisor Richardson describes the process that the public should follow: “With all the information out I hope people will take the time to read these documents and draw their own conclusions...Decide for yourself about the alternatives developed and then let us hear from you” (BAR File 2000).

Another press release created by the BNF describes a 15 day extension of the deadline for filing public comments on the DEIS. The release continues to explain the extension:



The Forest Service has currently received over 700 comments on the DEIS including comments from almost every state in the United States. Comments have also been received from outside the United States and include Canada, Ireland, and Belgium. Several requests by local environmental groups to extend the comment period have also been received. 'Due to the number of comments we have received and the interest in the proposed actions for recovery in the burned areas, I have decided to extend the comment period for the DEIS' said Rodd Richardson, Forest Supervisor. 'The additional 15 days will allow folks more time to review the alternatives and respond with their comments but still allows adequate time for implementation if an action alternative is selected,' he said (BAR File 2000).

### ***B.6 The Publication of the BAR Final Environmental Impact Statement***

Generally speaking, as the process of EIS analysis continues through the stages described above, public participation used in the planning of the project must be specific to the issues already outlined in earlier stages such as scoping. As the scoping process is used to identify issues for the purpose of creating alternatives for the DEIS analysis, the DEIS comment period is used to refine those alternatives for the publication of the Final EIS (FEIS) alternatives.

*B.6.1 Purpose, Goals, and Design.* As mentioned in the section above, the comments that are submitted by the public through the various channels provided are responded to by the agency in the FEIS.

The agency's responses to specific comments on the BAR DEIS are explained on Page 4-4 of the BAR FEIS:

The Forest Service Environmental Policy and Procedures Handbook (FSH 1909.15) provides direction on responding to comments. Possible responses are to:

- Modify alternatives included in the proposed action.
- Develop and evaluate alternatives not previously given serious consideration by the agency.
- Supplement, improve, or modify its analyses.
- Make factual corrections.

- Explain why the comments do not warrant any further agency response, citing the sources, authorities, or reasons that support the agency's position. (BAR FEIS 2001)

*B.6.2 Advertisement, Public Notice, and Media Coverage.* The FEIS for the Bar project was released on October 10, 2001. According to a press release, a letter from the forest supervisor was sent to the project mailing list informing the recipients that further documentation, this time the FEIS, was again available upon request from the BNF (BAR File 2000). There is no evidence in the project file indicating that the BNF was taking public comment on the FEIS. No legal notice or press release encouraging public comment is present in the file. There is also no notice in any media sources that the FEIS was subject to the same public comment period that the DEIS was.

***B.7 Discussion: The BAR Public Participation Process: Innovative Early then Largely Procedural***

As discussed in the previous chapter, the procedural requirements of the laws governing public participation in the analysis process are open to interpretation. Although the laws require that the agency undertake a "baseline" level of involvement, there is no "normal" procedure for public involvement beyond the vague statutory language as interpreted in the regulations discussed in Section A. Consequently, it is important to distinguish between the modes of involvement that the BNF designed and administered that are traditional (procedures mandated by law and regulation) and innovative (novel ways of involving the public that go beyond the procedural requirements). Particularly, the innovative modes including the Community Opportunity Series and social survey were a departure from the traditional model of participation. However, another trend that is observable in the documentation challenges the notion that

the entire process was somehow innovative as the process at large lacked any innovative forms of participation in its latter stages. In fact, the Final EIS was not even open to written comment which, although not required by law and regulation, is certainly made available in other NEPA processes.

It can be reasonably assumed that the BNF intended to create a meaningful public participation process for the planning of the BAR. Not only can this be discerned by the administration of modes that went beyond the legal requirements, but in the statement by Rodd Richardson made in the beginning of the project planning process that explains the overall intent of the agency: "Public involvement will be an integral component of the study process" (BAR File 2000). As well, this statement by Nan Christianson indicates that at least the initial stages of public involvement were "a chance for the agency to begin working with the public in a different way" (BAR File 2000). With this in mind, it can easily be surmised that the BNF believed that they did in fact make the "diligent efforts" described in the regulations to solicit input from the public. However, that the agency believed they had met this standard for diligence is only part of the story.

Whether the BNF considered it's initial goal of "integral" public involvement to have been met is not necessarily obvious in the former supervisor's statement in the Record of Decision for the project: "The Bitterroot National Forest has done an *extraordinary amount* (emphasis added) of public involvement for this project" (BNF ROD 2001). That they conducted an extraordinary quantity of involvement does not necessarily indicate a corresponding level of quality or *integration* of public input as described by Richardson at the outset of the process.

Noteworthy in the above review is the lack of explicit language explaining how the input of the public was used to affect the planning of the project and how exactly the

public was integral to the development of the project. This vital information was absent in the official 'in-house' documentation available in the file as well as the public communication that was created by the BNF such as press releases and officially published documents such as the EIS. For example, the summary of how public involvement was used in creating the recommendations contained in the post-fire assessment simply states that "the recommendations are based on current information and public input during the fall of 2000" (BNF Post-Fire 2001). Other examples found in the file have a similar thread: the documentation simply says that public input was used without providing a method or reason for their use. One exception to this was the use of the social survey. This mechanism for gathering input from the public provided both a concrete methodology and a relatively clear explanation for why the input was being requested from the public. This clear explanation of how and why public input was being solicited is a different approach taken than that of written or oral comments as the latter does not enjoy the same clear explanation.

Evident in the language used in this documentation is the techno-rational approach to the NEPA process. For example, notice the language used to describe the NEPA analysis: "The EIS will *analyze the benefits and impacts* of our proposals to reduce fuels, improve watershed conditions, and replant burned lands (emphasis added)" (BAR File 2000). Furthermore, the Draft EIS instructs those who comment to include "specific facts supporting reasons for the Responsible Official to consider" (BAR File 2000). This reference to "specific facts", or substantive comments, also indicates the value of technical, or at least 'factual' information to the NEPA process of analysis. Furthermore, a poignant example of the agency's charge to rationally justify why they do or do not use a comment from the public is captured in the following explanation about

how to respond to public comment. In this case, if the agency does not feel the comment is applicable or useful, they are simply required to: “Explain why the comments do not warrant any further agency response, citing the sources, authorities, or reasons that support the agency’s position (BNF 2001).

Certainly important in this chronology of the administration of the modes of participation is the compressed time frame in which this process occurred. It could be argued that the BNF would have had very little time to meaningfully analyze and integrate the “extraordinary” (BNF ROD 2001) amount of information that they had collected from the public. Certainly implementing an aggressive public participation program involving modes such as community conversations, not to mention the more traditional NEPA processes, is time consuming. It is obvious from the ID team notes discussed above that there was considerable time pressure on the ID team and the Forest personnel involved in the administration of this process. For example, the development of draft alternatives was indicated in the ID team notes as having been completed in 30 days and concurrent with public meetings. This may be an indication that input from the public meetings held during this time did not play a major role in the development of the DEIS alternatives.

This analysis has been done to better understand how the legal requirements outlined in Section A compare to the actual modes administered for the BAR as well as to make observations about the process from the official documentation. Additional discussion is necessary. Issues and challenges regarding the design and administration of these modes will be identified and discussed during the presentation of the perspectives of the participants on these modes. This discussion will follow in section D.

The legal and administrative issues discussed in these first two sections will serve as a contextualizing backdrop for the perspectives of the participants to follow. The BNF went beyond the traditional, procedural administration of public participation early in the process; yet, as the process went on, it increasingly resembled the traditional and procedural model. This procedural model is largely administered from the technological perspective and evolved as a result of a number of factors. These factors essentially provide the agency with a legal incentive to rationalize their decisions as they administer the NEPA process. The use of public involvement in this process of rationalization is nebulous and imprecise at best and, at worst, strategic and disingenuous. The identification of specific examples in the above chronology of participation for the BAR provides some examples of this tendency to legally rationalize decisions. In sum, it appears that although the agency made diligent efforts to involve the public in meaningful ways, especially early on in the process, they lapsed into the procedural and legally defensible rationalization mode of administration as the process proceeded. Why? The perspectives of the participants shed light on this question.

## **C. Participant Perspectives on Participation and Conflict**

This section will: (1) present the perspectives from which the study participants view the overall process of public participation for the BAR planning process, (2) elucidate themes among interest group participants while identifying differences and similarities between them, and (3) discuss these themes in the context of the theoretical framework described in the *Approach and Literature Review*. The writing has been organized into sections that correspond with perspectives identified in the content analysis of the interview data. Furthermore, the issues and challenges identified and discussed will be phrased in the form of questions—questions that can be used to better define the problem of legitimate participation.

### ***C.1 Comparing Perspectives on Legitimate Participation and Conflict.***

Study participants viewed the public participation process for the BAR from a number of different perspectives. Although none of the participants were asked to define their perspective explicitly, all described it in some way during interviews.

*C.1.1 Perspectives on 'The Process'.* Three general sub-categories emerge from the interview data: (1) perspectives that are rational and procedural—the techno-rational/synoptic perspective; (2) perspectives that identify bargaining and negotiation—the pluralist perspective and (3) perspectives on participation that are less procedural and rational and instead are power-based and political perspectives. Below is a sampling of the different phrases used by study participants to describe the process during interviews.

**Table 1. Participant Perspectives on ‘The Process’.**  
(All Participants Contributed to this List)

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**Techno-Rational Synoptic Perspectives**

- a. Legal/Procedural Requirement:
- b. Means of Disclosure/Mitigation of Environmental Impacts—a reasoned acknowledgement of the tradeoffs.
- c. A Structured, Methodical process
- d. Means of Notifying/Educating Public
- e. Means of Soliciting Feedback from Public

**Pluralist Perspectives**

- a. Strategic Bargaining/Negotiation Process:
- b. A Game

**Deliberative Democratic Perspectives**

- a. A part of the great experiment called democracy: messy values debate
- b. NEPA is Democracy at its Core--if done correctly
- c. A way for people to get involved in the management of their public lands
- d. Formal public participation is only one part of it—the best participation is actually non-project related and is a series of ongoing relationships

**Power-Based Political Perspectives**

- a. Public Relations/Propaganda Campaign
  - b. Formal participation is part of a greater process of advocacy, much of which is outside the record, whose goal is to affect the behavior of an agency--to gain power
  - c. Legal Monkey Wrench
  - d. Masochistic Process
- 

Study participant perspectives on the process ranged from those technical and rational (i.e., resulting in a “reasoned decision”) as well as those with more pluralist and deliberative overtones (i.e., “a messy values debate”) (Agency 5). Some participants went as far as to characterize the process as “masochistic” (Industry Comm. 10) and “a game” (Environmental Comm. 2) implying that the process certainly involves more than a series of procedural steps for a technically rational analysis. Overall, participants from all three interest groups viewed the process as legitimate from the pluralist perspective. There were also important perspective differences between interest groups. Furthermore,



participants had differing ideas of which perspectives were legitimate. The next sub-sections complement the table above by identifying, in the words of the study participants, the perspectives of individuals within each interest group.

*C.1.2 Agency Perspectives on 'The Process': It is a Rational Process; the Problem is the Non-Rational Public.* Agency participants generally described the process from the techno-rational/synoptic perspective. For example, this agency participant describes the NEPA process as follows:

The great objective of NEPA, and it's a very worthy objective, is that the person that is responsible for making that decision is informed. They are informed about what the public wants including divergent issues or opinions, of the effects, and of the tradeoffs of alternative courses of action, and they come out with a reasoned decision (Agency 5).

However, they continue by describing the challenges of integrating values from a pluralist democratic perspective while maintaining their expert/scientific approach:

We are here to manage these lands, these priceless treasures, for the benefit of the American public, which has very diverse values. So the problem, of how to go about doing that, is quite awesome, quite daunting, if you really consider it. The other thing I would say is that I and all of the other employees that work on these types of projects, BAR for example, are trained in many different fields, many of us have a NR training, and work experience, years and years of it, and our training has taught us how to meet, what we can do to meet the objectives of landowners, the problem is in this country today is that the American Public, i.e. Landowners, can't agree on those objectives (Agency 5).

This participant expressed their belief that 'the problem' is rooted in the inability of the public to agree on the objectives for the land that are based on values. Implicit in this example is the tendency for this participant to view the process from the techno-rational, but also pluralist democratic perspective.

This same agency participant goes on to express how formal processes that were 'corrupted' by 'grandstanding' were not necessarily legitimate:

“The rhetoric, true lies and false truths, they take, people tend to take these generic statements and make the case that they are universally true, when seldom if ever they are, they are partially true, but there is all this other information that is ignored potentially cause it doesn’t fit their values...I don’t see a great deal of value of it other than some times news reporters love it cause they get a nice juicy news clip or something [...] somebody is spouting off and making a passion plea, the grandstanding.” (Agency 5).

Described here are essentially political forms of discourse or participation that are outside the formal process of technical analysis described earlier by this participant and also considered to be strategic by many in the agency:

I think it is deceitful from the get go from the premise that ‘gosh we want to come in and talk with you about where we are about this decision or proposed action’, and then instead to use that as an avenue to say the meanest, hurtful, nastiest things you can. I find that real interesting. I still haven’t discerned whether that’s a ploy or whether the groups are so non-cohesive that they don’t have any control over each other and therefore never can speak as a unit, as a group (Agency 8).

Viewed from the pluralist/preference aggregative perspective, the goal of managing conflict can be seen as a vehicle for achieving multiple use—the conflict being between competing and mutually exclusive uses for the same forest. This idea was expressed by this participant in the following way: “The basic conflict in natural resource management is balancing amenities and commodities, always has been and always will be forever” (Agency 5). In this light, the process of “managing” is a process of “balancing”. This participant sums it up this way: “I simply don’t know that it’s possible to satisfy the two end of the spectrum. I think one would set themselves up for tremendous disappointment if we ever felt like we could satisfy everybody 100 percent” (Agency 12). This conceptualization inherently defines the process of managing conflict as one that will leave user groups at best less than fully satisfied. As this agency participant points out, in the case of the BAR “folks on both ends were dissatisfied” (Agency12). Together, these examples point to a belief on the part of these agency

participants that the preferences of the public are plural, pre-determined, and mutually exclusive—the basic tenets of the pluralist-preference aggregative perspective.

In sum, the following perspective represents the acknowledgement of the pluralist democratic perspective on conflict management:

It fell on the shoulders of those of us on the BNF to do the best we could to manage the conflict surrounding BAR. And I am not even sure if managing is the right word. Acknowledge we have conflict. I don't know what one does to manage the conflict, it's a democracy, conflict is inherent in a democracy (Agency 5).

*C.1.3 Environmental Community Perspectives on 'the process': It is a Non-Rational, Strategic, and Political Power Struggle.* Study participants from the environmental community generally felt that the process as administered by the agency was not legitimate and that political actions aimed at gaining power were more valuable in affecting the outcome. This participant from the environmental community defines the public participation process as occurring within the larger process of advocacy:

The way to affect the behavior of an agency goes beyond what is in the record because they were affected through press, through letters to the editor, through direct mailings, through public events that other people held on both sides of the issue. When you think about how to organize advocacy, the purpose of advocacy is to affect their behavior and their decision. (Env. Comm. 11)

This participant continues: “My experience with the FS is that it’s all been strictly power based, it's like they're listening to me because I can make their life miserable, it's that simple” (Env. Comm. 11). This participant’s belief is indicative of a trend among study participants that formal public participation as administered by the agency is simply procedural and not a valuable way to affect the outcome. The conflict, as viewed from this strategic power-struggle perspective, takes the form of attempting to manipulate the opponent. From this perspective participation is legitimate if it successfully can affect the behavior of those perceived as opponents, in this case, the agency.

Describing the NEPA in a different way from the agency participant above was this member of the environmental community:

The people get to participate in the decision, they don't get to veto, they don't get to do a majority vote, but they get to participate in how it's done. NEPA, when it is done right, I mean that is the vision of it, is basically democracy at its core. (Env. Comm. 11).

However, these participants also repeatedly expressed their preference for an outcome based on "the best available science". In this sense, these participants ascribed to the techno-rational perspective, at least in terms of the arguments they made (Enviro. Comm.

2). Whether or not the use of science was strategic or simply an expression of value translated into technical language, or both, the reliance on science by environmental community participants was high. / *science*

*C.1.4 Industry Perspectives: It is a Political Process that Instead Should be Used to Improve Conditions "On the Ground".* Study participants from the timber industry viewed the process from the techno-rational perspective and therefore felt it was legitimate. These participants did not view the power-based and strategic perspective legitimately yet acknowledged that some members of the industry community participate in political, strategic ways.

The following participant from the timber industry refers to the use of press and "disinformation" while acknowledging that "both sides" participate in this way:

Well we know there is a lot of disinformation that gets out there in the press during the timing of all this analysis work. That does influence the agency; it influences the NEPA analysis process, not that it necessarily should unless it's an absolutely legitimate issue that hasn't been analyzed. So things get down to the wire and there is more and more rhetoric and less and less substance [...] I think it's pretty much an even street, we've actually seen it on both sides here in Montana, it's been quite interesting watching the emergence of activism on the sort of producer/user side of the issues. It's been interesting to watch how organized and vocal they've gotten where as ten years ago it was pretty much just the environmental groups that were engaging in that sort of activity (Industry 7).

/ *Rhetoric  
or  
Substance*

One major difference can be observed between this perspective and the similar statement made by the environmental community participant above. While acknowledging that both sides participate in political avenues of participation, this participant implies that information should be limited to issues ‘with substance’. We can assume that this participant meant to contrast this technical and ‘substantive’ discourse with information conveyed through the media—political discourse. While making reference to the technical “analysis” process, this participant views the process from the techno-rational perspective, while finding the power-based strategic perspective less than legitimate, while admitting that certain sectors of the industry community participate in this way.

Other industry representatives also made reference to their belief that the environmental community’s use of political advocacy techniques to affect the decision was less than legitimate because it aims at affecting larger level policy issues, not project-specific technical ones:

When planning is talking about policy, it’s an entirely different aspect than when you are talking about planning choices of operation. Well a lot of the argument that’s going into this isn’t because they don’t think the proposal is being done right, they don’t believe or support the policy that’s backing the alternatives, and therein is probably the thing that needs to be shifted somehow. The one is a political issue, and the other is far more pragmatic, and as long as they are mixed up, we are toast. ( Industry 10)

Furthermore, they express their belief from a technical perspective as they make their claim in the language of science. Having just described a particular type of vegetation treatment that would benefit forest health, this participant goes on:

And I don’t have a whole hell of a lot of hope that that’s going to go forward because there will be this vested interest and that vested interest and the science of forestry, you know, keeping the forests healthy, fundamentally overrides whether the trees are cut or they are not cut or how they are cut. And we have totally lost a focus. You sit and watch the two sides beat [each other] up--it’s like a dysfunctional family having a

divorce and they'd rather kill the kid or the pet than let the other person have it! (Industry 10).

*C.1.5 Issue/Challenge: Do Varying Expectations of 'The Process' Contribute to Conflict and Legitimacy?* The varying perspectives on the process as expressed by these interest groups above are striking. For example, agency participants in this study, while generally voicing legitimacy through the techno-rational perspective, also expressed perspectives on the legitimacy of pluralist democracy. An indication of this belief is evident in their repeated references to “ends of the spectrum” and the need to respond to the diverse values that are held by the public. However, study participants from the agency and industry discuss the ‘corruption’ of the process through politically strategic acts and the use of “rhetoric”. Although the use of these tactics is viewed as legitimate from the power-based political perspective held by the environmental community, it is not considered legitimate by agency and industry, with some exception as industry admits to having resorted to using some degree of strategic political advocacy. Environmental community participants generally lapsed into power-based strategy perspectives as they discussed the lack of outcome influence they perceived through traditional techno-rational/synoptic models. Many study participants from the environmental community generally <sup>Subscribe</sup> ascribe to the power-based perspective because of their perception of the agency as not responsive to their input. Additionally, as the perspectives of some environmental community members indicate, they also perceive the agency and industry as ascribing to the power-based strategic perspective as they label the agency’s technical/rational information “propaganda” (Enviro Comm. 11). Indeed evidence presented above indicates that all three interest groups participate on a power-based, political, and strategic level during the planning process while noting that, ideally, legitimate participation would occur through other means (i.e. if only the NEPA process

was “done right”, we wouldn’t have to be activists). Every participant in this study, at some point during the interview, was visibly frustrated.

*C.1.6. Conclusion: Distorted Communications and Expectations.* The perspectives of environmental community participants are generally consistent with literature criticizing the process as highly procedural and lacking in effective ways of influencing the outcome or decision (Grumbine 1992). The environmental community seems to expect a techno-rational “game” (Enviro. Comm. 2) administered by experts who act strategically themselves.

Wondolleck (1988, 65) describes the discrepancy between the techno-rational and power-based political perspectives:

In theory they are rational processes involving land managers reviewing proposals, assessing impacts associated with these proposals, evaluating several alternatives, and, only then, rendering a decision. [...] It assumes that with sufficient information about a proposal a land manager will be able to make an appropriate decision; one that efficiently utilizes public land resources and, in so doing, satisfies the public’s interest in land management. In practice the process plays out a much different story.

This discrepancy can be also be related to the idea of ‘distorted communication’ (Dryzek 1997) through competing discourses. As these communities view the problem of participation from different perspectives, their basis for participation may be different and they may expect different things from the process. Because of the lack of agency models of participation that allow for value-based, political discourse (Cortner and Moote 1999), the process becomes strategic (Wondolleck 1988). Groups act in the hopes that their understanding of the problem will influence the decision in some fashion, whatever form of communication this may take. These groups may consequently be talking past one another in that they are speaking in different languages, or discourses. In other words, if during the process of planning there is no established expectation as to how

exactly the process will serve the groups, they adapt and utilize whichever discourse seems to fit their ends best. In this case, the discourse is generally limited by the agency to that of techno-rational. Because of this limitation, the expression of value-based preferences does not hold weight in the process of planning in the same sense that scientific, technical information does.

Interestingly, strategy often involves an effort to participate in influencing the project using the language of science that is seen as antithetical to and often competes with forms of political discourse. As strategic behavior ensues, 'the process' suffers from the dueling scientist dilemma (Busenberg 1999)—that is individually held preferences for an outcome can be supported and justified based on scientific data regardless of their acceptability to all parties. This use of science in this strategic way can also be considered a corruption of the rationality of the process; however a science war is exactly what the participants in this study referred to over and over again as possibly affecting the outcome. While the environmental community's reliance on science to support their preference for a certain decision was high, some from the industry community claimed that the science of forestry was being stifled as a result of faulty policy, while the agency seems to have the upper hand in this debate because of the scientific expertise they claim to possess. This clash of scientific expertise implies a deeper level conflict that has to do with the values that underlie these science-based arguments rather than a simple lack of scientific agreement about what actions are best.

Science  
+  
Values

While acknowledging that the overall process is viewed differently by the interest groups in this study, there is a need to address the more specific modes of participation for the planning of the BAR as well. The following section will outline the perspectives of the participants on the issues of legitimacy and conflict management within the



specific context of individual techniques for participation. This analysis will provide greater insight as to what participants believed to be legitimate modes of participation.

#### **D. Participant Perspectives on the Modes of Participation for the BAR Project**

This chapter will discuss how participants viewed individual modes of participation for the BAR planning process. Understanding these perspectives helps identify which modes are more or less legitimate and capable of managing conflict.

The modes discussed in this section include both non-formal communications between interest groups as well as the legal/formal modes outlined in Section A and B of this Chapter. This more complete list of modes for participation includes: pre-scoping communications; community conversations; social survey; NEPA scoping; DEIS open houses; direct contact with FS personnel; field trips; DEIS written comments; appeals; litigation; mediated settlement.

Along with presenting the perspectives of participants, this section also identifies corresponding issues and challenges that are salient to the particular mode discussed. These issues and challenges are not only important to the discussion of the public participation for the BAR but may also have implications for public participation legitimacy in general. These questions can be used to better define the problem of legitimate participation.

In order to provide a compilation of recommendations based largely on the perspectives of participants, a tentative conclusion is provided at the end of each subsection. This conclusion is accompanied by a set of bulleted recommendations drawn from specific suggestions made by participants during interviews as to how to improve

individual modes while also building on the common perspectives of participants while taking into account the differences. For a more comprehensive overview of participant perspectives on the particular modes of participation please see Appendix B that is organized in sequence with this section.

### ***D.1. Pre-Scoping Communications***

As explained in the section on defining participation, some participants made a distinction between the formal modes of public participation for the planning of the BAR and other, non-formal methods of influencing the outcome of a project. There certainly was a level of non-formal communication that occurred prior to the publication of the project's official 'Notice of Intent to Prepare an EIS' in the Federal Register.

*D.1.1. Issue/Challenge: Are Informal Communications Valuable?* Although pre-scoping relationships and communications certainly are both appreciated and have the potential to create a more personal dialogue, these process-oriented goals are often secondary to the desired outcome of the decision by any one interest group. Although laudable, the goal of "putting a face to a name" and diffusing bureaucratic and interest group stereotypes does not necessarily address the issue of how the pre-scoping communications are used by agency decision makers and their overall affect on the management of conflict between interest groups and the agency.

Additionally, the timing of this mode of participation can be problematic because of a lack of substantive, concrete issues to be discussed at this early stage in the planning process. The following agency official explains "to really get a conversation going folks need to respond to something rather than start with a totally clean slate" (Agency 12). What this participant is referring to is the tendency for interest groups in particular to

only be interested in a project once it has taken some coherent form rather than conceptualize the plan themselves from the beginning.

early involvement

*D.1.2. Conclusion: Ongoing Communication Can Help Personal Relationships but Should not be Considered a Replacement For Dialogue Based Negotiation During the Project Planning Process.*

who is so privileged as to negotiate w/ the agencies  
this isn't democratic

- More ongoing relationships occurred between industry and environmental community than between the agency and these two communities.
- The agency conceptualizes these ongoing communications as ideal but not capable of changing any group's position and as well conceptualize these relationships as happening between agency and 'public at large' rather than with groups.

## ***D.2. Community Conversations as part of the 'Community Opportunity Learning Series'***

The community conversations were an attempt to do something different and engage the local community in the process to set management priorities after the fires (see Section B.1. of this Chapter). In the words of one agency participant: "because of what happened here, if we were ever going to get out of our box and try something different now was the time to do it, so we really were given some license to think about how to have a healthy conversation" (Agency 12). In addition to attempting to build on common experience and identify common goals, the community conversations were intended to broaden the range of the public that usually participates.

*D.2.1. Issue/Challenge: How to Engage the Interest groups?* It seems one salient issue among many that can be pulled from this series of perspectives on the community conversations is that the timber and environmental communities were generally not present at these conversations. Why? Was it that they were not worthy of their time? It

appears that the comments made by participants in both the environmental and industry communities indicate that the point at which these organized groups look to become involved is when substantive outcomes become clear. At the least, the organized interests do not seem interested in “sharing their stories” about the fires (one goal of the community conversations). Perhaps more importantly, they did not have substantive input through this mode with regard to what the priorities would be for recovery. It seems, rather, that the interest groups perceived this mode of participation as not intended for them. If we consider that the “grandstanding” that agency officials cited as one reason for creating this format was due to the prior actions of these “two ends of the spectrum” then the interest groups are correct—these community meetings were not meant for them, or at least for the type of political discourse that the agency perceives as negative and coming from these two groups. The obvious issue then becomes how does the agency engage the interest groups who, as mentioned by all agency officials, are typically difficult to deal with in the public setting while realizing that they will attempt to influence the project’s implementation through other power-based and strategic points of access, for example through the use of litigation.

Also at issue is the fact that the agency used the priorities gathered through the community conversations to “feed into the scoping process” (Agency 5). The inclusion of these management priorities as documented in the Post-Fire Assessment was an important part of the process of scoping all the relevant issues. This assessment was the basis for the DEIS and essentially summarized the most formative part of the “issue identification” process (see section B.1.1 of this Chapter). If the issues were first identified by the small sector of the public that attended the community conversations, then the obvious question would be, ‘are these priorities truly reflective of the larger

community that didn't participate in the community conversations. Enter the Social Survey.

*D.2.2. Conclusion: Legitimate Participation is both Early and Ongoing.* |

- BNF should specifically address the fact that the interest groups did not participate.
- BNF may consider engaging these communities early through reaching out to them directly and explicitly.
- The issue of timing, as with the pre-scoping communications, is a challenge when trying to engage the interest groups who want a plan to react to before they become involved.

***D.3. The Social Survey***

This mode of participation, while having been used previously on other National Forests, was a new approach for the BNF. The general aim of the survey (see Section B.2. of this Chapter), was to gather the opinions of Ravalli County residents on what management actions the forest should prioritize as well as how the public wanted to be involved as the planning process moved forward. Similar to that of the community conversations, many of the participants of the industry and environmental communities did not participate in this mode although they certainly had an opinion on the use of the survey. The environmental community's across the board dissatisfaction with the use of the survey was notable. At issue for the environmental community was that questions were biased, the sample only included local residents from Ravalli County, and that the information was used to support a pre-determined outcome: salvage logging (See Appendix B for examples).

*D.3.3. Issue/Challenge: How Should Statistically Valid Public Opinion Surveys Be Administered and the Data Used?* Answering this question with any justice is outside

the scope of this study, however. One issue relevant to this study can be found in a discussion of the use of 'data' in the policy debate. In analyzing the perspectives of the agency, it is clear that they acknowledge the plurality of preferences that the public holds while attempting to translate these value based preferences into numbers. The problem here is that, as pointed out by an agency participant, statistics can be argued in favor of one outcome or another. Indeed this is a fundamental problem with the use of the survey 'data' regardless of what independent body administered it.

Stats  
can  
support  
any course  
of action.

To compound the difficulty with this mode was the sample that excluded the adjacent community of Missoula, the wording of the questions, and the agency's choice to focus on the area of data that supported salvage logging. These first two are essentially methodological problems and can be alleviated through a couple different mechanisms, such as (1) widening the scope of the sample to include communities of place that may be more representative of national interests and (2) writing the questions to be used in the survey through convening a round of focus groups that include a broad representation of interests. These are simple suggestions but go far to exemplify that the survey's method will be scrutinized and, if not addressed up front, will serve as a springboard for claims of bias by already adversarial interest groups.

Questions

Representative  
Sample

The use of survey data in the planning of a project does not yield detailed information about how actions should be accomplished (what is selective logging anyway?). Although this fact challenges the idea of using a survey to decide what specific actions should take place on the land, there is hope for the survey to be used to shape 'management direction' as the agency claims it was used in the case of the BAR project. However, there was no reason mentioned by agency participants for the apparent inconsistency between the high value the agency placed on the quantitative data resulting

Survey can founds  
ignorance,  
generalizations  
misinterpretations

from the survey and the low value of other modes in this process that could be used quantitatively, most notably the use of written comments that are not considered “votes”.

There is certainly no hope for this mode to be viewed as legitimate solely from the deliberative democratic perspective in that there is little to no opportunity for two-way exchange. It may function to simply make individuals aware of the majority of preferences of the greater public. Even a cursory glance at the actual survey data reveals that the BNF used the data selectively. For example, the question of “which of the following management actions would you like to see the BNF take” was asked of survey participants. The response categories were “Planting Trees, Stabilizing Soils, and Getting Stream Areas Back in Shape”, as well as “Salvaging Burnt Timber”. All of these areas for management action received over eighty percent support according to the survey results. Rather than honing in on one particular treatment--salvage logging-- presenting all of the areas in which the public had high levels of support would be an effective way to enable the public at large to see where their own preference lies in comparison to the ‘majority’.

The use of public comment as a straw vote, as Nie (2004) discusses, could be more useful, particularly as viewed from the preference aggregative perspective, to meet the challenge of integrating value-based data. The results could be used to gauge public opinion in general while making the data and its analysis public would decrease the opportunity for claims of bias as well as serve a learning function. As with all modes, if the public was informed up front how the results of such participation are to be used the agency would be making an important step towards transparency.

Surveys must address points of tension, not mere generalities  
↓  
who wouldn't want to plant trees & restore stream  
??

Transparency of culture of self preservation

#### *D.3.4. Conclusions: Create Opportunity For Publicly Administered Opinion Poll*

*While Being Very Clear How This Information Will Be Used Upfront.*

- State clearly how the data from public opinion polls will be used before they are administered.
- Use a joint fact finding approach to the design, administration, and analysis of the survey to alleviate the perception of bias. This could include convening focus groups to gather relevant ideas from the community. These ideas could be used to base survey questions on.
- Attempt to represent all the findings equally, use the media to advertise the entire set of findings thereby enabling the public to compare perspectives and learn.
- Expand the sample to include Missoula, or, to include communities that may be more representative of national interests.

#### ***D.4. The Scoping Process***

Upon being asked how valuable the scoping process was, the following agency participant responded:

That language comes from information, both the science and the social interaction with the public that the NEPA law, but we use it on the NFMA side too, it was important and led us to a set of proposed actions. There were six recovery priorities, we selected the first three. Reduce fuels, improve watersheds, reforest burned lands, we developed proposed actions for each of those categories, and then we held our scoping, dealing with proposed activities, activities that were map-able and describable. Prior to then on the NFMA side, it was all quite conceptual (Agency 5).

We can see here that the BNF used ‘scoping’ prior to the formal/legal NEPA process began to help inform their ‘proposed actions’—the set of management actions that the public can respond to during the NEPA scoping process. Important here is that the set of actions are only ‘proposed’ and primarily viewed by the agency, in most cases, as a “conversation starter”. As is evident in the above agency participant’s perspective, the amount of public involvement done to inform and help develop the NEPA scoping period’s proposed actions was significant. The beginning of the official NEPA process



was initiated by the filing of the Notice and intent to prepare an EIS in the federal register as explained in Section B of this Chapter. The scoping period usually provides for the opportunity for written comment letters to be submitted to be used by agency officials in the “issue identification” phase of alternative development— this is the process of ‘scoping’ the potential issues to study in the EIS analysis. In other words, the project is theoretically still in the very beginning stages of concrete treatment development. The Draft EIS—the document that will begin the in-depth environmental analysis and study alternatives--will be written using public input gathered during the scoping period (see Section B.3 of this Chapter).

*D.4.1. Issue/Challenge: To Help Identify the ‘Scope’ of the Issues, Support a Pre-Determined Outcome, or Establish Legal Standing?* These three contradictory issue/challenges addressed in the context of scoping underscore how NEPA can be viewed both from a techno-rational or power-based perspective. The obvious dichotomy can be identified in comparing the perspectives of Agency and the other two interest groups. For example, the perspective of one Agency participant who, as they describe the process using language similar to that written in the legal requirements, lays out the procedure of this step in the NEPA scoping process without specific mention of how this data affects the development of the ‘proposed action’. The lack of a clear explanation for how the information provided during scoping will be used to craft a proposed action seems problematic in itself. Combine this with the idea voiced by the environmental community and one timber industry participant that the agency’s decision is pre-determined at this point, and the power-based strategic perspective may become pervasive at this point in the process—particularly if interest groups have not already adopted a strategic approach by this time.

As the Scoping period is the first official legal step in the NEPA process, the establishment of legal standing for judicial review through participation in NEPA, as discussed in the *Introduction*, begins to enter the discussion. In the case of the BAR, the community conversations and the social survey (NFMA scoping) were used prior to the official NEPA scoping process to help develop the proposed action. Because these groups often do not participate until there is a concrete proposal to discuss and comment on, they largely did not participate in the NFMA scoping and therefore, by the time the official NEPA scoping process began, the perception that the agency had already made a decision seems more plausible.

*D.4.2. Conclusions: Make Explicit the Use of the Data Collected During Scoping, Aggressively Seek it Out, and Change the Proposed Action Based on the Commonly Held Interests.*

- As with all modes of participation, make clear how public input will be specifically used in the process.
- Identify the interest groups that usually participate in the formal/legal NEPA process and aggressively seek their input on proposed actions. Furthermore, identify commonly held interests and use their input in measurable ways that can be seen by those who participated.
- Strive to create a forum for ‘issue identification’ early on, as was done with the community conversations for example, but specifically for interest groups. This may also serve to elucidate the details of issues that some claim are lost in the traditional scoping process (broaden the range of alternatives for analysis). This may take on the form of an advisory group made up of a cross-section of interested parties.

#### ***D.5. Direct Contact with Agency Personnel***

There is no legal limitation to the amount of direct contact individuals or interest group representatives can have with agency personnel while a project planning process is

underway (see B.4. of this Chapter). However FACA does place limitations and procedures for enacting an organized committee of non-agency advisors (for practical guidance on FACA *see* Croley 1996). This ‘direct contact’ mode of participation can include phone calls or face-to-face meetings. All participants in this study placed a similar high level of value on direct contact with agency personnel, particularly decision makers who, in this case, included the BNF Supervisor and individual district rangers.

*D.5.1. Issue/Challenge: Is Direct Participation a Realistic Option for Mass Participation?* Is a direct meeting, identified as being between organized groups and a decision maker, a legitimate way to participate? This question gets to the heart of the dichotomy between organized interest groups and the public at large. An issue/challenge voiced by agency participants above has to do with representation. Are a self-selected group of people representative of the greater public? Certainly forums for mass participation are the antithesis to that of a private meeting. The reality of this case is that a very select few people participated throughout the process, particularly throughout the formal NEPA process. As was mentioned above, the ‘sophisticated commenters’ are the members of the public that usually participate in the ‘clarifying’ of language in the NEPA documents. Although the agency’s preference for ‘substantive’ comment is well-known, and can seemingly be viewed as legitimate by both communities, at least one agency participant seemed to not like the idea of a select few having so much influence on the decision through direct efforts to participate.

Looking at these direct meetings from the power-based/strategic perspective, these meetings can be used to intimidate the decision maker through personal attack or, from the techno-rational perspective, as an arena for substantive discussions of the EIS. A participant’s perception of legitimacy while participating in this way most likely

depends on whether they believe the decision has been decided upon already. If meetings occur early on enough in the process to influence the issue identification, then not only can substantive clarification proceed but also value-based input could be taken into account by the decision-maker. Again, as with the discussion of scoping, the early work for BAR project issue identification occurred primarily through the community conversations and social survey. By the time interest groups became heavily engaged, the decision was well on its way to being defended rather than concocted.

*D.5.2. Conclusion: Create Opportunities for Direct Participation Early That Have Substantive Focus and Can Legitimately Shape Alternative Development.*

- Value-Based input can be expressed, but non-aggressive and respectful communication must be a pre-requisite. The personality of the individuals who are to meet is a paramount consideration.
- Opportunities for interest group representation at meetings should be considered as a separate goal from that of involving the public at large.
- Meetings should occur early in the process of issue identification; otherwise expect strategic behavior and the perception that the decision has already been made.
- Discussion of values can occur through a focus on common interests, not positions (Fisher and Ury 1991) or, if well-facilitated, deliberative reflection may occur by design. Either way, a discussion of substantive issues will help discussion from degenerating into purely emotive discourse.
- Again, the formation and utilization of an advisory group made up of representatives from a number of interested sectors of the public may provide the agency with a better opportunity for negotiating a common understanding of the project.

## ***D.6. DEIS Public Meetings or ‘Open Houses’***

The public meeting format used during the DEIS comment period of NEPA was called an ‘open house’. These meetings differ from the traditional hearing format or question and answer session in that they are designed for information sharing and the small group dialogue, not public testimony or questioning of Agency officials (see Section B.5. of this Chapter).

*D.6.1. Discussion: What Are Public Meetings For and Should Types of Discourse be Limited?* It is clear that members from all three interest groups agreed on the informational value of the ‘open house’ meeting. A commonly held belief among the environmental community and some industry participants was that the ‘open house’ format limited learning opportunities and dialogue, while Agency and industry perspectives indicated that ‘grandstanding’ was a form of political discourse that was less than legitimate.

From a techno-rational perspective, the open house is quite legitimate as it serves the purpose of disseminating technical and site specific information about the various action alternatives to the public. In this way all three communities ascribed to this perspective. It is valuable because the public can formulate preferences based on technical information and comment on the alternative that they find best fits their preferences.

As is exemplified in the perspectives of many Agency participants, these open house formats were in fact intended to limit the type of discourse that is permissible to that of technical and, if not that, then rational. Although some industry members mention that ‘both sides’ participate in public meetings through the use of political discourse, one industry member mentioned in particular their concern that this type of discourse is not

legitimate. Ostensibly viewing the meeting format from a deliberative perspective, many environmental community participants alluded to the idea that, along with information dissemination, public dialogue should be a primary purpose of the meetings. Moreover, the final perspective expressed by an industry representative underscores that ‘public’ meetings are not necessarily the venues for participation preferred by these organized interest groups.

*D.6.2. Conclusion: Create Some Meetings For Informational Purposes, Others For Deliberation.*

- The primary purpose of the ‘open house’ should be stated clearly (to disseminate information) in public notice and advertisement while also notifying the public that separate meetings for public deliberation will be held at later dates.
- Once information is disseminated and can be digested by the public, another round of meetings that aim at public dialogue should be held.
- Proper facilitation is a paramount for meetings that aim at deliberation and dialogue. Without this, meetings will not manage conflict.
- The sequence of these meetings aims at creating a level playing field by informing all interested with the same information; then gives opportunity for personal comment and deliberation with agency and other members of the public.

*D.7. Field Trips During DEIS Comment Period.*

During the DEIS comment period, the BNF invited the public to join them on two separate field trips to view ‘demonstration sites’ that were small versions of the treatments proposed in the DEIS. They functioned to complement the written description by serving as a visual representation. These field trips also presented the public with an opportunity to ask questions and be further informed by BNF officials as to the details of the project.

*D.7.1. Issue/Challenge: Are Meetings in 'the Field' Effective for Conflict Management or Do They Simply Exacerbates Differences?*

Participants from all interest groups expressed their field trips serve to help people see the on the ground truth from similar perspectives. It reduces abstraction and serves as a basis for discussion of the tangible situation they create. Study participants from all three interest groups agreed that the field trip was a legitimate format for dialogue-based participation, even if the outcome was agreeing to disagree. Here we see the propensity for these interest groups to ascribe to the pluralist perspective as they primarily view the conflict as between their individually held preferences. Theoretically, these meetings in the field could serve as a forum for deliberation—thoughtful reflection on personal preferences combined with the opportunity to change those preferences—but the reality according to these participant perspectives, is that these opportunities are more likely to be used to convince the ‘other side’ of their position. More likely the ‘dialogue’ that some participant’s describe resembles a process of bargaining. If deliberation is an ideal that seems out of reach for these entrenched communities, then field trips could serve simply as a non-confrontational, comfortable environment for pluralist dispute resolution. The design of the dispute resolution process enables parties to focus on common interests as opposed to positions (Fisher and Ury 1991, Susskind and Cruikshank 1987). If individual perceptions of a clearcut, for example, are simply too difficult to reconcile through on the ground discussion, then the focus of the field trip may need to be adjusted to include discussion of the ‘health of the forest’ or ‘watershed health’—larger, interest based ideas.

*D.7.2. Conclusion: Create Field Trips that Focus on Larger Level Interests*

*Rather Than On the Ground 'Truths'.*

- Facilitate field trips to serve the function of engaging interest group members on a larger level interest based discussion, not demonstration projects that show what Agency actions will look like.
- Treat the field trip as a venue for personal interaction in a less contentious environment.
- Time these trips so that interest group members feel that their interest based concerns will be integrated into the project's' proposed action' rather than once the alternatives have been sketched out. Early engagement of these interest groups is a key to preventing the perception that the Agency has already made a decision.
- Time these field trips earlier in the process of alternative development.
- Create separate, educational field trips for the public at large, the aim of which is to get people 'on the ground'.

***D.8. DEIS Written Comment Period***

The second round of written public comment for the NEPA process occurs immediately after the publication of the Draft EIS. At this point in the development of the analysis, the document identifies a number of different alternative courses of management 'action alternatives' as well as a no action alternative. These alternatives are the basis for a comparative analysis (see Section B. 4. of this Chapter)

*D.8.1. Issue/Challenge: How Should Input be Used in Shaping Action*

*Alternatives and is 'Substantive' Input the only Legitimate Form of Comment?*

Environmental community participants perspectives ranged from valuing the comment period for basic technical information purposes to the belief that comments submitted by the environmental community were not only (1) ineffective at changing alternatives, but (2) were used strategically by the Agency to legally bulletproof the project in the event of



an appeal or litigation. The perspective of some in the environmental community advocated for a use of the comment process as a way of gathering a sort of popular vote, regardless of whether the comments take the form of technical/substantive comments or form letters. Industry participants expressed the perspective that the comment process being used as a form of popular vote was not legitimate. One industry representative characterized the process of submitting substantive comments as less than legitimate because of their lack of meaningful influence on the shaping of the alternatives.

Many Agency participants referred to this stage of the process as legitimate and valuable for managing conflict because (1) the written form of communication is clear, (2) its legally documented, and (3) its rational and methodical approach to analyzing the comments of the public. There were also those who believed the 'corruption' or misuse of the process by interest groups was strategic and a delay tactic. Meanwhile, with regard to how comment is used, some of the Agency participants in this study contradicted themselves when speaking to the idea of comment being used to aggregate preferences (as a vote), or to help 'shape' the alternatives (not a vote).

What may be particularly germane about this issue/challenge is the stage at which this written public comment is gathered. As indicated by participants from all three interest groups, the number of 'sophisticated commenters' is relatively low at this late stage of the planning process and they must possess the knowledge of the documentation and the time to gain that knowledge to meaningfully participate. As a result, the number of people participating decreases and the issues that can be addressed in comments must be limited to the alternatives already written into the DEIS. At this late stage of NEPA, the substantive comment requirement does not give ample opportunity for the public to shape the outcome through value-based comments. As written comment on the DEIS

will be limited to those that are substantive and treatment focused, additional mechanisms for value-based input to be integrated into the process should be provided for early on. Most likely the scenario present in this case is that the conflict over the narrow range of alternatives that, as discussed in section D.4, were perceived to be too narrow was never resolved. The agency continued through the process without sufficiently addressing this conflict. As the process went along, the written comments for the DEIS submitted by the environmental community were meant to broaden this range. However, because of the agency's perception that the large range of comments submitted are used strategically as a delay tactic, these comments may not be taken seriously into account except as the agency decides which the environmental community might litigate on. The degeneration of the process continues. As both the environmental community and the agency use this venue for continuing the strategic power struggle, the focus of their efforts are aimed at the inevitable legal proceedings that they both perceive as almost inevitable. The process of legal strategizing perhaps culminates with the submission and response to comments on the DEIS.

*D.8.2. Conclusion: If the only legitimate DEIS Comments are those Deemed 'Substantive', Then Provide for Value-Based Comment Early on During Issue Identification.*

- Legal strategizing may be mitigated through the aggressive solicitation of value-based input early on in the process while remembering that interest groups prefer modes of direct participation with decision makers.
- If value-based comments can be used early in the process of 'issue identification' as the 'proposed action' is being developed then the substantive comment requirement could be used solely in tweaking the specifics of the alternatives for treatment.

### ***D.9. Administrative Appeal***

The administrative appeal period for the BAR project was bypassed as the Undersecretary of Agriculture, the highest Responsible Official for the project, signed the Record of Decision thereby eliminating the opportunity for higher level administrative review. As a result, there was effectively no appeal process for the BAR project.

Participants expressed conflicting perspectives as to what value the appeals process has in general. Other perspectives expressed center on the agency's motivation for the bypass.

Each interest group has different perspectives on these and other issues regarding the use of the administrative appeal process and the lack of appeal period for the planning of the BAR.

*D.9.1. Issue/Challenge: Is the Administrative Appeal Process a Legitimate Way to Participate and Should Appeals be Somehow Limited?* Two main perspectives were shared by participants from the industry and Agency communities. The first was that, on a basic 'checks and balances' level, appeals are legitimate because the process gives the Agency an opportunity to pause before they make a decision. In this same vein, the process also allows for issues that may have slipped through the cracks in the NEPA process to be brought up. These were generally referred to by industry and Agency participants as legitimate uses of the administrative appeal process. However, as with the agency's perspective on the use of other modes of participation discussed above, the process has been corrupted through its current use by the environmental community. The environmental community uses frivolous appeal points with no relevance to the project at hand, sometimes even forgetting to change the name of the project while "paid professionals" (Agency 5) cut issues from old appeals and paste them together to make new ones. It is clear that these communities believe that the appeals process is used

strategically to delay the implementation of projects—particularly time sensitive treatments such as salvage harvest—by adding time to the process. Every participant from these communities expressed a version of this perspective. With this perspective in mind, agency participants indicated that they bypassed the appeals process as a way to get to court faster because they knew they would be sued.

Perspectives expressed by the environmental community with regard to the value of appeals fell into two main categories as well ranging from perspectives on the appeals process in theory to perspectives on the process in practice. The first perspective was an expression of legitimacy for the purpose, as these participants define it, of the appeals process: as an opportunity to address the not yet resolved differences. As these study participants from the environmental community understand it, the process is sometimes effective at integrating their concerns into the decision in one of two ways—through a granting or a settlement of the appeal that avoids litigation. Additionally, legitimacy is built in to the appeals process, because of the higher-level review in the Agency that the appeal receives. This higher-level review, as one participant noted, is also a way for the decision to be reviewed from a national level thus ensuring the local forest's compliance with national priorities. Also expressed by one participant was the value of the appeal resolution meeting as a venue for negotiation but that by this late stage in the game the decision has a tremendous amount of momentum behind it and is less likely to change.

While these perspectives all identify the appeals process as somewhat rational, other environmental community participants identified the appeals process in practice as simply another opportunity for influencing the outcome that was disregarded by the agency. As a result, the dynamic of strategic behavior has been well established by this point in the process and the environmental community's expectation while filing the

appeal is better explained as an opportunity to establish legal standing than as a meaningful negotiation.

Industry and Agency also generally agreed that the process of appeals takes a long time thus supporting their perspective that the environmental community uses it as a delay tactic. Environmental community participants on the other hand denied this.

*D.9.2. Conclusion: The Opportunity for Face-to Face Negotiation and Higher Level Review Can Happen Earlier in the Process.*

- Create opportunities for appeal-like forums that are informal and earlier in the process yet meaningful in shaping the outcome (negotiation).
- Eliminate the legal strategizing by removing the appeal process from the list of necessary steps to establish legal standing; this would essentially provide the aspects of the process that all participants agreed upon as legitimate.
- Streamline the administrative implementation of the appeals process so that meaningful negotiation can occur without the potential for delay.

## ***D.10. Litigation***

As the appeals process was effectively eliminated through administrative action, the only avenue of recourse left for participants to dispute or change the decision for the BAR project was through litigation.

*D.10.1. Issue/Challenge: Is Litigation a Legitimate Way to Participate and Should Litigation be Somehow Limited*

As with other modes, there is general agreement between these three communities as to the very basic value of litigation as a means of civil dispute resolution. Additionally, the environmental community participants generally agreed that the courts were a valuable venue for having their grievances addressed and the outcome of the decision changed. Individual participants from the Agency and environmental

communities also shared the perspective that litigation is costly and confrontational and therefore should be avoided.

Differences between the perspectives of interest groups fell into two categories. As with the appeals process, industry and agency participants voiced the perspective that litigation was not being used in a legitimate way by the environmental community. More specifically, the strategic use of litigation to simply stop a project, as with administrative appeal, should not be encouraged. Participants from the environmental community generally made the case that the agency's losing record in court proves that they are simply breaking the law. As the industry and agency generally believe that the accrual of case law has enabled the environmental community to litigate and win easily, the environmental community believes just the opposite. They express the idea that, while having been read by the courts as a simply procedural law, the threshold for success in a NEPA lawsuit is high because of the tremendous amount of agency discretion.

*D.10.2. Conclusion: Aggressive and Meaningful Participation May Avoid Litigation if Participants Feel that They Have Been Heard and that Their Input Has Affected the Outcome.*

- Using the recommendations that have been suggested in conclusion to the above modes of participation should reduce the need for judicial review of the decision.
- If judicial review is sought out by a community that has been meaningfully engaged throughout the process, it is reasonable to believe that these members of the public did not perceive the process as providing the means for effective resolution of their concerns; or they are acting strategically and simply prefer the courts as a more effective venue to address their concerns.
- Early and ongoing forums for negotiation may reduce this perception.

### ***D.11. Mediated Settlement Agreement***

As the case went to court in the Federal District Court in Missoula, MT, Judge Donald Molloy ruled in favor of the environmental litigants on their claims of procedural mismanagement of the appeals process by the agency. The agency appealed to the 9<sup>th</sup> Circuit Court of Appeals. The court gave the plaintiffs and defendants an option: come to a decision on what the parties could live with in forty-eight hours or the decision will be made by the court. The parties agreed to a closed-door mediated settlement. The mediation participants included lawyers for and members of a coalition of environmental organizations, the agency (including the Undersecretary of Agriculture who signed the decision), and a number of timber industry representatives that had signed on with the agency defendants.

*D.11.1. Issue/Challenge: Is a Court Ordered Mediated Settlement a Legitimate Way to Participate?* The environmental community participants in this study all expressed the perspective that the mediation was very effective in changing the outcome and therefore reducing the environmental impacts of the project. Agency and industry perspectives indicated that this mode was valuable from the perspective that it was a relatively fast way to get some work done on the ground and avoid the delay often associated with litigation. Agency participants did mention their dissatisfaction that the general public was shut out of the mediation.

This ending to the BAR saga has important implications. First, for all of the agency's effort to involve a sector of the public that normally does not participate through innovative forums, the agency failed to design a forum for organized interest groups similar in form to the mediated settlement that would provide direct and meaningful influence over the project outcome. Second, does the presence of agreement among the

two interest groups regarding the legitimacy of the mediation and the expressed lack of legitimacy by the agency indicate that the agency felt this mode was a most direct threat to their power? Without answering this question, the fact remains that regardless of the voluminous scientific and techno-rational NEPA documentation, 14 community conversations, social survey, and other processes that the BNF provided for participation, the outcome of the BAR project was decided by a select group of policy participants using a process that resembled a backroom deal. This fact eclipses any idealistic notions of the process being rational in some scientific sense, capable of representing the interests of the public at large, and/or embodying deliberative, dialogue based democratic elements. It instead indicates that this process is but one venue in a large scale political debate about both what constitutes a set of legitimate substantive management goals and what procedures will best accomplish those interest-based goals.

*D.11.2. Conclusion: Mediation Should Occur Earlier in the Planning Process.*

- Because the process of post-decisional disputes such as appeals and litigation can delay or halt project implementation, provide a process for direct outcome influence earlier in the process. This may instill a sense of process legitimacy in the participants that eliminates their perceived need to seek out these other venues for accomplishing their interests.
- This scenario implicitly requires that the agency be willing to give up some of the power that they currently hold without the threat and/or use of court intervention.



## V. CONCLUSIONS AND RECOMENDATIONS

### A. Clarifying the Policy Problem

According to one agency study participant, “We try to do what's right on the land in concert with what we understand to be the majority of the American public's values. The problem is that the American public, i.e. landowners, can't agree on the objectives [for the land]” (Agency 5). What exactly is the problem? Is the problem, as this agency participant explains, one of a public in need of agreement about their different objectives for the land? Is the problem the corruption of the rational technical analysis process by policy advocates? Or is it that the process is supposed to be democratic by providing a venue for value-based input? Certainly a large part of the problem is a product of these differing definitions and expectations that participants in the policy process have of what the process is supposed to be. This lack of common expectation of the participation process is an example of the wickedness of this policy problem—the lack of common definition of the problem *is* the problem in this case.

Accordingly, study participants from the three interest groups expressed different perspectives among them regarding the legitimacy and conflict management capacity of the public participation process for the BAR. It is noteworthy that study participants from all three groups expressed their belief that at least one of the other two groups were participating in the planning process strategically and therefore illegitimately. Generally, the industry and agency groups expressed similar views on the environmental community's illegitimate use of strategy whereas the largest differences in perspectives occurred between the agency and environmental community. Furthermore, participants from the environmental community and industry shared preferences for direct

participation and negotiation with agency decision makers. These generally indicate that this political struggle for power includes defining the legitimate use of the procedures for public participation that best achieve the interests of the group. Environmental and industry participants generally felt that legitimate forms of participation and those that they prefer are ones that directly affect the outcome and thus manage conflict. This leads to the conclusion that the techno-rational NEPA procedures administered by the agency simply delayed what inevitably would resolve the political level conflict: a negotiated deal-making process among a group of interest and power-based stakeholders which ultimately decided this highly symbolic and precedent-setting policy outcome. In this sense, the power-based, pluralist, and political perspective is useful in explaining the sordid story of the BAR and further recognizes that the process for involving the public through NEPA is not currently implemented in such a way as to address the questions in need of further clarity. These questions are ones that have to do with the values that underlay the interest based positions of the participants rather than those of a technical and science-based nature. In sum, the controversy over public participation on a large-scale political level is about power and the struggle between various branches of the government and sectors of the public to gain or keep this power to affect policy through whatever means necessary including the project level planning process.

As each of these communities attempt to define what legitimate participation is for themselves, their clash of expectations about the process becomes a source of conflict among the participants. This conflict over *process* exacerbates the elusive preference-based and substantive agreement on the policy *outcome*. How is agreement to be reached, or at least conflict among plural, substantive preferences managed, through a process that is not viewed as legitimate by all participants because they all want different

things from the process? Is there a link between process and outcome? It would appear so from this analysis as the positions participants hold about the efficacy of the policy process are inextricably linked to their preference for a policy outcome. In essence, participants define the legitimacy of the participation process in such a way as to further their substantive interests. If participants perceive the process as legitimate in that input can meaningfully affect the outcome of the decision, then they are more likely to feel that the decision manages the differences among their value-based positions.

In this spirit, processes that can meet the common expectation that participants have of the process—that their input will make a difference—can work towards instilling a sense of common understanding and may reduce this conflict over procedure and process. Clarity is definitely needed, both in terms what general policy will prevail in guiding the Forest Service among plural, multiple interests and their uses and the procedure for coming to this conclusion. An understanding for democratic participation in Forest Service planning needs to be clearly articulated and an expectation common to all created. This clear expectation should be based on the perspectives that interest groups share with regard to what constitutes a legitimate process. In this case, that a plurality of different value-based preferences exists among participants is a common perspective to all communities in this study. The common expectation that needs to be instilled is that the process will provide a forum for these value based positions to affect the outcome. For this to occur, the agency's process must provide some level of power to the interest groups during the planning process. Currently, this power is highly constrained by the agency (if present at all) through their administration of the planning process and ultimately is forced to be handed over, in part, through the courts and other political venues.

***A.1. Ample Agency Discretion and Congressional Intent for Meaningful Public Participation.***

Acting as technocratic experts within the paucity of specific legal guidance seems to be the default mode of the agency. The courts have surely only added to this problem as they require only procedural implementation and a reasoned decision—requirements perfectly tailored to an agency of techno-rationalists. Who can blame them? Certainly not Congress, who as Nie (2004) addresses in regard to the lack of statutory clarity regarding the question of what purpose the public lands are to be managed for, could step in and answer these questions. This would shift the venue of conflict from project level rulemaking to the Congressional arena where, ostensibly, the issues and challenges endemic to public participation in administrative rulemaking would be diminished. Regardless of how much this overarching crisis of mission identity contributes to project specific conflict, there is still a severe misunderstanding as to how much power the public and agency should have in the process of planning projects. Currently, the agency decides both how they will involve the public (the process) and to what extent the public's input will be used in crafting a decision (the outcome).

***A.2. The Procedural Requirements of the Law Were Fulfilled While an Effort was Made to Break from Tradition.***

An in-depth look at the official project file for the BAR reveals a lack of specific explanation of how public input was used to shape various levels of the projects development. What is clear in a comparison of the BNF's administration of the process is that the procedural requirements of the law were fulfilled. However, the BNF relied heavily on the input of the relatively few citizens who attended the community

conversations as well as the aggregated preferences of the local residents gathered through the social survey to identify priorities and create a proposed action for the NEPA process (See Section B.1 and B.2 of *Analysis and Discussion*). By December of 2000, prior to the official NEPA scoping process, the BNF had published the Post-Fire Assessment that recommended management priorities for the next three to five years. As explained in the document, the input gathered from the community during the community conversations and social survey contributed to this plan. As the organized interest groups did not participate in these modes, it comes as no surprise that groups who normally do not participate until a project is proposed would view the project's outcome as pre-determined. Furthermore, it also appears that the BNF had essentially put the majority of work with regard to meaningful public participation into the planning process up front, used that information to craft a proposed action, and essentially made their decision before the official start of the NEPA scoping process. This is most likely due to the fact that the project planning process had a very tight timeline and left little room for meaningful involvement throughout the process of planning.

The agency's heavy reliance on quantifying public preferences and legitimizing the proposed action was based on numbers. Their use of the public's opinion, what they describe as the majority of residents of Ravalli County, runs directly counter to the assertion made about processes such as written comment that are not intended to quantify public opinion and are not considered a vote. This can be understood as a specific example of differing expectations of how a particular mode of participation should be used in the process. Perhaps this discrepancy comes from the agency's belief that the pluralist majority's preferences should be the basis for setting general management priorities for the proposed action of the project. From this view, later stages of the

process would then seek out substantive, technical comments on how to craft specific management alternatives that achieve the general priorities set by the public's preferences at the earlier stage of the projects development. This sequence of narrowing the acceptable type of input or discourse from that of value-based input to that of substantive and technical data effectively limits more general, value-based input to the early stages of the project's development. If the interest groups are not present in these early stages of project development, it is reasonable to expect that they will perceive the process as having excluded them from value-based influence.

Although the goal of involving a sector of the public that had traditionally not participated is laudable, the agency seemed to ignore the fact that the large scale political conflict was not going to simply disappear. The agency essentially changed the rules of the game and expected interest groups to conform, or not. As should be obvious by now, not only is the substance of decisions contested, but so are the procedures for participation. Because of the high degree of power wielded by the agency in terms of the design and use of participation, this move to define the problem in terms of a lack of broad representation can be seen as either a way to simply further the democratic ideal of broad participation, or as a purely strategic move to limit the influence of their opponents in the long and drawn out political struggle for power.

### ***A.3. Varying Expectations of the Participants: Legitimacy and Conflict***

The three interest groups in this study share one perspective in particular: that there exists a plurality of value-based positions among them and the public at large. They do not share a common perspective on the legitimacy of the power-based strategic approach. All groups generally hold the perspective that the other corrupts what should be rational modes of participation through their strategic and political use of them.

The power-based approach is primarily viewed as legitimate by the environmental community, although, as explained above, only because it can get them what they want. Although as the timber industry has sensed a decrease in their control of the National Forests in recent years, they have begun to participate in more power-based and strategic ways in an effort to influence policy. Also interesting is that the conflict among perspectives seems to occur mostly between the agency and the environmental community. Could this be a result of the fact that, as the agency believes, the environmentalists are simply not playing fair? More likely is that this is an indication that the environmental community has been a greater threat to the power that the agency has held for the better part of a century, and continues to guard closely.

#### ***A.4. Participant Perspectives on the Modes of Participation***

Participants from the agency consistently expressed the perspective that the modes of participation were legitimate and exhaustive. Many of them literally asked ‘What more could we do?’ Participants from the environmental community and industry consistently expressed their preference for forms of direct influence on the project outcome and therefore defined legitimacy based on the level of influence on the outcome that a mode could provide. Although threads of the deliberative perspective could be observed in all three interest groups, the reality of true deliberation is far from being realized through any of the modes used in the BAR planning process (the one theoretical exception would be the community conversations). There was much more agreement on the legitimacy of modes that occur early in the process such as the value of direct contact with agency personnel and field trips. There was considerable disagreement as to the legitimacy of post-decisional modes of participation including appeal, litigation, and

mediation. This supports the conclusion that early and aggressive involvement of these interest groups could reduce the post-decisional conflict by keeping the process within the administrative arena and out of the courts. For specific conclusions and recommendations for each individual mode of participation see Section D of *Analysis and Discussion*.

It is noteworthy that some members of the environmental and industry communities expressed their willingness and desire to meet face-to-face both during and outside of a specific project's planning process. In fact, community members met during the project planning for the BAR and, as indicated by one environmental community participant, seemed to have things worked out with regard to what was acceptable to both of them. This may have important implications for the management of conflict and the possibility that, as claimed by many environmental community participants, the BNF was not interested in a resolution of the conflict, but rather the opposite.

#### ***A.5. Summary of Conclusion***

The link between the legitimacy of the *process of participation* and the legitimacy of the *policy outcome* or decision is still somewhat unclear based on this case. Does the process of legitimation simply a process of explaining the rationality of a decision to the stakeholders? Not if the process of rationalization is simply a legal exercise in bulletproofing the NEPA documents as has been suggested by some study participants. Not if the type of discourse is limited to that of technical and rational when values underlie the positions of the stakeholders as in this and other natural resource management cases. Furthermore, evidence from this study suggests that interest groups are most highly interested in the outcome of the decision, not necessarily how fair or



equitable the process of getting there is. This evidence is strong and the idea that the decision maker must simply explain the rationality of the decision to the interested stakeholders is simplistic when put into the context of this large-scale policy dispute.

Upon undertaking this study, I believed that the process of participation could in fact manage conflict. I still believe this although the challenges brought to light through this investigation have contributed to a much more complex understanding of the contested role participation commands as well as the larger level issue of what role agency decision-makers play in democratic society. How much power should these agencies have in making value-based decisions? Can bureaucrats successfully decide these important public issues or should elected officials be making these decisions? This question has been asked for years and as evidenced here is still ripe for debate.

Furthermore, the following specific questions with regard to how people influence policy are not necessarily new to the study of public participation—who will participate, by what rules, and how will their participation be used?—yet they remain hotly contested, particularly among those involved in influencing the process. This case provides an excellent example of the continuing struggle among political actors to define the proper role that the agency and public should play and in so doing influence individual policy outcomes in a direction that establishes precedent for their large-scale policy positions.

This conundrum does hold some promise for improvement. Because the natural resource decisions facing the public today are in fact more controversial than ever, public interest in these issues is high. Questions about the continuing development of public participation for National Forest planning that are particularly important include: How should the Forest Service balance national level interests with local interests and how will these two be properly represented; How should the Forest Service deal with the increase

in participation both by organized interest groups as well as the general public—should they begin to count preferences like votes, in some majoritarian fashion? If so, how does the agency intend to balance the preferences of the majority of these sectors of the public with the mandates they are beholden to by Congress? Do the policy outcomes of the majority differ from those embodied in the Congressional statutes? Should these mandates change or be further clarified? All of these are questions that have been largely ignored by many in the field of natural resource management yet they have major affects on a participant's sense of the legitimacy of the decision process as well as the policy outcome. As a result many have focused too narrowly on how the process itself can be tweaked and improved to benefit the participants. I too entered this study with those intentions, however throughout the process I have come to believe that there are many more questions than answers to be discovered about public participation.

## **B. Recommendations.**

Clearly the questions posed above are the large level questions in need of further clarification before the process of participation finds its proper place in democratic governance. However difficult to answer these may seem, a few suggestions directed toward the process as it now exists may be helpful in managing conflicting interests during the planning process.

### ***B.1. Meeting Participant Expectations: An Integrative Approach.***

A process that allows for the inclusion of multiple types of discourse may be a successful approach to resolving this apparent discrepancy. As is discussed above, the three groups in this study overwhelmingly share the pluralist perspective, however. As the theoretical frameworks discussed in the *Literature Review* are not mutually exclusive, the design of a process that responds not only to the perspective most commonly held by participants but integrates the techno-rational, pluralist, and deliberative perspectives holds promise in moving beyond the purely pluralist and power-based perspective. As expressed by all three groups, strategic use of the process is illegitimate, but only if it is the 'other side' that is acting this way. Public participation designs that can integrate these three perspectives may thus satisfy the varying expectations of the participants and reduce the perception on the part of the groups that the agency is unresponsive to their concerns.

This is the process-outcome link: processes that can provide for multiple perspectives to co-exist will be capable of providing a common technical language for citizens and groups to utilize (techno-rational) while acknowledging the public discrepancies among preferences (pluralist), but rather than trying to discern a majority, these differences can be used in a *constructive* fashion by providing the possibility of individuals to change their mind about their preference for a certain outcome through talking about it (deliberative). Furthermore, the clear articulation of how input from the public gathered through a particular mode of participation will be used in affecting the decision may help to instill a sense of legitimacy in the process among participants. This recommendation proposes that the conflict stemming from the differing expectations can be reduced by setting common expectations for the process. This still leaves the conflict

among preferences to be sorted out, however without this first crucial assessment and design consideration, the conflict that all communities agree is endemic to democracy—conflict among values that inform preferences—is not able to be constructively managed through the public participation process. Furthermore, using processes that integrate these multiple perspectives may be more successfully used in more “average” forest planning cases rather than the highly symbolic and precedent setting type examined here.

### ***B.2. Customizing Modes of Participation for Interest Groups.***

The agency should consider making the distinction between the public at large or those who normally do not participate and those interest groups that are entrenched political adversaries and customize the modes used for each sector of the public accordingly. Generally, modes that acknowledge the pluralist perspective hold the promise for negotiating between these interest-based communities. Principles of deliberative and collaborative models that integrate a process of negotiation among pluralistic preferences through a deliberative process hold even more promise for conflict management. Volumes have been written on the theory, design principles, and implementation for forums for negotiation, collaboration, and deliberation. One of these principles is that there is no one size fits all approach to designing forums that accomplish these goals, therefore this study avoids making specific technical and design recommendations while acknowledging the work in this field of Fisher and Ury (1991), Kemmis (2001), Susskind and Cruikshank (1987), and Wondolleck and Yaffee (2000).

Perhaps the BNF envisioned the *Compass and Gyroscope style* of planning (Lee 1993)—the public points to direction management should take through an expression of values early in the process and then agency uses their scientific expertise to get there.

Essentially this is an adaptive approach to managing the ecosystem while using public input. This sounds neat but two problems can be identified here. One problem is that the devil is in the details—that is, one person's 'recovery project' is another's environmental Armageddon. The agency can be pro-active about addressing this through providing the proper information for ongoing discussion as they simply provide participants with the common language (science). The second problem occurs because of the social learning nature of the individual. As has been discussed, science too can be used to justify two antithetical versions of 'recovery'. One possible solution has recently been put forth by Busenberg (1999) and addresses the idea of collective ownership of technical information as key to the acceptance of outcomes based on that technical data. He suggests a joint fact finding model that provides a format for this collective search for knowledge. If joint fact finding is viewed as legitimate by interest groups and they are willing to participate then this technique could de-emphasize differences in positional arguments, as suggested by Fisher and Ury (1991), while emphasizing the co-creation of not only the outcome, but the data that supports it. If this were to occur, entrenched interest groups may be more willing to set aside the all or nothing positional arguments and focus on common interests through a process of common technical analysis.

## **APPENDIX A: INTERVIEW QUESTIONNAIRE**

### **MODES OF PARTICIPATION FOR BURNED AREA RECOVERY**

Scoping Written Comments

Scoping Meetings called "Community Conversations"

Social Survey by U of Montana Bureau of Business and Economic Research

Post DEIS Release Public Meetings or "Open Houses"

Field Trips

Direct Contact with Forest Service Personnel

Environmental Impact Statement Written Comments

Administrative Appeal

Litigation

Mediated Settlement

### **QUESTIONS TO BE ASKED ABOUT EACH MODE TO EACH PARTICIPANT**

1. Did you participate in this way?

*[ What were you hoping to accomplish through this mode? (BNF Staff Only) ]*

2. Is this a valuable way to participate?

2a. What did you expect to get from participating?

3. Should people be encouraged to participate in this way?

4. How does this mode of participation work to manage conflict?

### **GENERAL QUESTIONS ABOUT PUBLIC PARTICIPATION**

1. What do you think the BNF does with this public input?

2. Do you believe that your participation made a difference?

3. For what purpose does the public participate?

4. What other types of pp should the BNF have used in this process?

## **APPENDIX B:**

### **Excerpts from Participant Interviews**

#### **FROM C.1 Perspectives on the Process**

Before we get into the details of what we did, I think there is some context that is important, I mean, A, we are a democracy, B, these are public lands, it's the employees of the FS and those of us who work on the BNF to try and manage in accordance with the wants and needs of society, the American public, well, that's a complicated process, and democracy is not always real straightforward. Other forms of government have been tried, our founding fathers decided not to have a dictator, and they were going to try this great experiment, and I think were still sorting through that experiment, so I believe that, I personally adhere to this, and I am confident that other employees on the BNF as well as the FS take that to heart, we are here to manage these lands, these priceless treasures, for the benefit of the American public, which has very diverse values. So the problem, of how to go about doing that, is quite awesome, quite daunting, if you really consider it. So that's one piece of context that I think is important when it comes to public participation. The other thing I would say is that I and all of the other employees that work on these types of projects, BAR for example, are trained in many different fields, many of us have a NR training, and work experience, years and years of it, and our training has taught us how to meet, what we can do to meet the objectives of landowners, the problem is in this country today is that the American Public, i.e. Landowners, can't agree on those objectives. And so that adds to the dilemma of, and it's not a dilemma but the challenge, of trying to do what's right on the land in concert with what we understand to be the majority of the American Public's values, wants, goals for their public lands. It's quite interesting. Really what you are studying is less Natural Resource management and more government and social science. (Agency 5)

#### **FROM D.1. Pre-Scoping Communications**

*D.1.1. Pre-Scoping Communications with Agency Officials.* Many agency officials had informal communications with local community members, timber industry operators, environmental community members, and with others inside the agency at regional and national levels. As one industry participant explained:

I think they got an awful lot of public input prior to officially starting the scoping process, because it impacted so many people personally in the Bitterroot I think there was an awful lot of communication from the supervisor level to the regional office, individual forms of communication, people were expressing their interest well before the scoping process occurred and that's probably not so dissimilar to most forest service projects. [...] I think some people perceive that nothing happens until that point in time and that's not true. There is a wide variety of interaction that occurs amongst forest service folks and in interaction with the different publics whether they are political types or individuals (Industry 1).

As discussed in the above section on context factors, there was a tremendous level of interest in the project--many communities of interest, local to national, were curious to see what would happen next after the fires died out. Some of the initial discussion occurred informally through a series of post-fire recovery efforts undertaken by two formally organized teams: the Burned Area Emergency Recovery Team and the Bitterroot Interagency Recovery Team. The full extent of their work is outside the scope of this project however, as one agency official noted in the last section, agency officials working on the subsequent BAR project were involved in some of the emergency recovery work being done after the fires:

I think why it helped that I had the perspective from being on the BIRT team was that I was going out on an every other day basis and working with people who had been affected by the fires [...] So I heard what people were saying, and I could take that, I mean everybody was out working, all the leadership team, with community members. [...] I could see what people wanted in terms of recovery, in terms of what they needed, and there were people who just needed clothes for their kids (Agency6).

As these agency officials interacted with the public, both through formal recovery teams or otherwise, they had conversations about what comes next:

Well certainly there was a fair amount of that and I participated in some of that as well as other folks on the forest, informally, you know, call it work. Acquaintances, friends, relatives, there was certainly a lot of dialogue going around, lots of people participating in that, it wasn't necessarily recorded for the record. I am not sure what to add about that, if it was something particularly germane, a particular issue, we'd document it and include it in our planning process (Agency 5).

These communications between public and agency officials were occurring largely outside of the formal processes outlined in chapters 1 and 2. This agency participant commented on the value of these communications in general:

The best public involvement doesn't begin or end but is kind of an ongoing thing where you might begin with the relationships and you keep going with conversations and engage people in different ways and then when an individual project comes up, there is a formal process we follow but an individual project doesn't necessarily define the beginning and the end of a relationship or exchange of opinions and ideas (Agency 12).



The relationship development value of these communications was voiced by another agency official:

When people see your face then you are not just a bureaucrat out there, or you're not just an environmentalist, or you're not just a logger, but you are you and I am me. So whatever you say to me, it's a personal relationship and not bureaucratic and that, in any situation, that's critical (Agency 8).

This participant continues adding:

You know for the element that will actually listen to a compromise, I think it plays a real important part, for the element, that soul thing, when an issue becomes part of somebody's being, it still plays an important part but I know there is not going to be any change in what their desired outcome is, what direction it is they want to see a project go, um, but again it goes back to that they know and we know we are not dealing with an unnamed faceless entity, maybe at the end it does come down to respectfully disagreeing-agreeing to disagree (Agency 8).

Interestingly, no members of the agency identified an ongoing relationship with the environmental community, or the timber industry for that matter.

*D.1.2. Pre-Scoping Communication Between Communities of Interest.* What is germane about the mode of informal/pre-scoping communications are the ideas of value and conflict management. The above agency officials seem to find these communications quite valuable, primarily for relationship building as a means of conflict management. The following industry official also touts the benefits of ongoing relationships as they can often not only reduce conflict but, “in fact, you can actually totally avoid conflict” (Industry 1). This participant goes on to explain their efforts to maintain relationships with the environmental community and how that helps the two communities of interest “work through conflict when it comes to decision time” (Industry 1). This participant’s sentiments echo those of the agency representative above and are tentatively echoed by an environmental community representative as they explain: “I think when relationships are at their best it sometimes happens before scoping” (Enviro. Comm. 2). More than one environmental community representative expressed appreciation and identified as valuable these types of pre-scoping efforts of outreach that they had experience with, particularly on other projects.

Interestingly, there were some direct communications between the environmental community and the timber operators that had existing contracts on the forest at the time of the fires. These existing sales were shut down during the fires season and were also

burned over during the fires, requiring new NEPA analysis to continue work on these sites. According to one environmental community participant, there was some consensus between the local operators and the local environmental community with regard to timber salvages operations after the fires:

The other thing that we did was we went out on field trips with [timber industry reps] come to our meeting and we went out on field trips with them, they had an existing sale, and we went out and we talked about, ok, how can we get through this, and we were saying 'oh you stay out of roadless areas', and 'you do this and you do that, keep it small,' and, so we both told them [agency] the same thing (Enviro.Comm. 11).

Although the following timber industry participant does not refer to the field trip or details of what was discussed as the environmental community participant does, they do go on to say that they are “involved with a lot of discussions with a lot of different environmental community members and it very much helps” (Industry 1). As this pre-scoping communication happened between industry and the environmental community as well as between industry and the BNF, no participants mentioned significant pre-scoping communications between the environmental community and the BNF as having occurred. Although this participant agrees that relationships contribute to pre-scoping communication, they continue by clarifying that “in this case they certainly didn’t involve me [...] prior to scoping [...] nothing like a real concerted effort to communicate with the conservation community” (Enviro. Comm. 2).

### **FROM D.2. Community Conversations**

*D.2.1 Agency Intention.* This participant goes on to explain the intent of the format design used for the conversations:

So we hired an outside consultant, she was a proponent of a process called appreciative inquiry, and the whole point of that is to start conversations with what you have in common and then kind of build on that to what you would like to see in the future. And the thought is that the process itself helps reduce conflict a little bit because you really are building on things that you share as common values or experiences, and hopefully that helps each of us understand why what we want in the end might be a little bit different, but it also helps us realize what our end goals might have in common as well (Agency 12).

This agency participant’s perspective is representative of all agency participants with regard to this issue and identifies the value of these conversations as a mode of public participation in terms of the broadening of sectors of the public that this format encouraged:

I know that I saw people at these community conversations that I haven't seen before, and so to me whenever you can out reach to a group of people that haven't been noticeably involved, and we are going to try something similar in our forest plan revision, trying to get some goal, starting with that smaller scale one-on-one public contact before we get into the formal process. (Agency 8).

This was echoed by all agency participants and appears to be a commonly shared idea with regard to the purpose and design of this mode.

Upon being asked if the environmental and timber interests were present at those community conversations, one agency participant commented:

Not to a great extent but I think what was neat about the community conversations was that it drew our people in the middle, and in most of our public involvement processes, scoping and all the other things, it's not difficult for us to make connections and hear from people who really feel strongly, and maybe those people tend to go to the two ends of the spectrum (Agency 12).

Again, it appears that the value of this mode of participation in the eyes of the agency was to engage a sector of the public that normally doesn't participate and therefore increase participation by those usually left out of the planning process.

Also at issue is the format of these meetings and how the agency's intent was to minimize the "grandstanding" that had been common at public meetings in the past. All agency participants appeared to perceive these prior experiences as negative and also discussed their belief that these meetings functioned as deterrents for participation:

We know that when we used to have a lot of public meetings that people quit coming to them because they were not pleasant. People don't need to go out when it's twenty degrees and go listen to a bunch of people yell at each other [...] (Agency 8).

As the community conversation format was intended to minimize the negative, unconstructive communication that has been identified above as undesirable, the agency's "intent was to find this other group of folks. We are always looking for the middle ground folks." (Agency 8).

*D.2.2. Interest Group Attendance and Perspectives.* For the reasons discussed above, most of the participants in this study from the timber and environmental communities did not have a personal basis to comment on the community conversations because few of them attended, however. There were perspectives expressed by some participants that are relevant and should be noted.

One participant from the environmental community noted that the conversations failed to complete the "catharsis" that they were intended for (Enviro.Comm. 4). This

participant obviously perceived them to be intended for some community venting or therapy session. Whether they were directly intended to effectively give the opportunity for this or not, they were intended to {quote here agency on intent of ‘appreciative inquiry’) bring the community together in a sense and continue the good will that that was evident during the fires as neighbors helped one another to get through the crisis.

This participant continues to say that:

The problem is that it can actually be detrimental I think if they give people an opportunity to get up on the soapbox and pound it and then legitimize anger, legitimize a reactionary stance towards the other interested stakeholders such that it can legitimize, well ultimately a member of FOB got confronted in a parking lot threatened with bodily assault, managed to get out of there without getting hurt, came pretty close to getting beaten up. So my judgment based on that is they didn’t allow the kind of catharsis to complete itself. They didn’t even accomplish that [...] and it was a community therapy session, everybody got to come and vent, and then they packaged it up and sent it into whatever black box they sent it into and things went on as normal. Enviro. Comm. 4

A member of the timber industry added, “I question how useful they are, I mean it’s nice to give people the opportunity to show up, but I don’t think there’s much substantive that comes out of it” (Industry 7).

This perspective of a participant from the environmental community touches on the idea of asking the difficult questions that are latent, under the surface questions during the conversations:

You can’t avoid the hard question. If you set up a forum that avoids the hard question, and doesn’t at least admit it is there, doesn’t look it in the eye, then that thing that you are ignoring is going to get you (Enviro. Comm. 11).

This idea of avoidance can also be seen as an issue of lack of clarity of purpose for the conversations. Although the agency might have had a clear idea of what purpose they were holding the meetings for, or an even better idea of what they were hoping to foster— “more collaboration and less arguing” (Agency 5)—this clarity may not have ever reached those who attended and certainly did not reach those who were absent.

One agency participant indicates the idea behind this open-ended approach to these meetings stating that the agency wanted to “start out slow, let people speak and share their thoughts, move into well what do we do next sort of stuff, if people want to share their personal experiences of 2000, and then start talking about well what should we do next--wide open” (Agency 5).

### **FROM D.3. Social Survey**

*D.3.1 Agency Intention.* As one agency official explained:

Before the fires of 2000 were out, our forest supervisor talked to other forest supervisors, his counterparts, or district rangers that had faced similar catastrophic events. We asked them to come and talk to us about lessons they had learned. That was real valuable for us cause we didn't know what to do, we were all new to this, and so a commonality among all of them was that they had done some sort of social inquiry, or at least a couple of them had, and that you were able to use that as a basis for, among many of the other tools, the public participation to go forward (Agency 8).

Upon asking another agency participant about the appropriateness of the timing of the survey, done in November of 2000, they answered this way: "I thought it was very appropriate. That information should have, did feed into scoping and that was part of the point of it. We asked, "How would you want to be involved in the future?" (Agency 6). Many of the agency participants expressed very similar ideas about the intent of the survey. Compared to the community conversations, the survey:

"had a similar intent: what should the forest service do, do you want to see pro-active management, do you want to see hands off. I mean there were a bunch of different questions but it had the same general theme: what should happen in this valley, what's the common thought, and again if I remember correctly one of the questions asked was do you support some management, do you want the forest service to go ahead and get to work. And that was the question that showed really a tremendous percentage of respondents saying 'yeah we want to see some proactive management' (Agency 12).

Because the ideas gathered through the survey were presented as statistically sound data due to the administration of the survey by the Montana Bureau of Business and Economic Research, all agency participants in this study referred to the results validity as independent research extremely valuable. This statement is representative of the perspectives expressed by all agency participants:

I think one of the first things that we started thinking about is how do we get a handle on what are, how to understand the cross section of opinions out there, how do we get a handle on that. And so that's why we contracted with the U of M to conduct a public opinion poll. That was very valuable information, very valuable. There are so many people out there that we never hear from. So the social survey, that's fabulous information, and it gave us a real sense, and is statistically valid, of what people want, and it's quite clear also, about what appropriate management of the post-fire environment should be (Agency 5).

As evidenced above, agency participants relied heavily on the statistical information that came from the survey, or at the least thought it was "very valuable" and "fabulous information," although one agency participant added: "You can take a statistic and argue

it A and you can argue it B, I mean it's how you want to interpret that, so they have to be used with caution (Agency 6).

*D.3.2 Community of Interest Perspectives and Participation.* Upon being asked if the survey mechanism was valuable and had the ability to manage conflict, the following participant from the environmental community responded:

If they were presented in an unbiased way, if the questions were written without any particular agenda in mind that would be a good thing, but as you know survey questions could be written to slant the results in the favor of one agenda or another. So I guess it just gets back down to how is the survey formed, yes it can be valuable. Yeah, once again I think if it's good unbiased information and it is presented in an unbiased way to educate the public about what other people are thinking, it can manage conflict, I don't necessarily think it was done in the Bitterroot (Enviro. Comm. 9).

Another environmental community participant, upon being asked to discuss the value of the social survey, responded, "I mean it's a valuable approach but you have to be very careful how you ask the questions, especially when you have something complicated like that" (Enviro. Comm. 11).

With regard to the survey's use in conflict management, it seems the environmental community's perspective is summarized by the following:

I think it was a tool that the FS used to say 'see we are in agreement with, or in disagreement with' if they were in disagreement they would never point to it but if they were in agreement they would point to it and say we are just responding to what the majority of people in Ravalli County want (Enviro. Comm. 4).

Another environmental community participant explains why the survey was viewed as "a piece of advocacy" as the BNF disseminated the results through the media:

And so when the thing came out, it came out with a lot of fanfare, it said this many people agreed with this, they also put it out with a bunch of press right away, so we saw it as just another political push for their agenda, that's how it appeared. So we had to rip it apart, do counter press, we were actually talking about doing our own survey, and so we saw that as a piece of advocacy (Enviro. Comm. 11).

Also at issue for all of the participants in the environmental community was the limited geographic scope used for the survey: Ravalli County. This participant noted: "There was dissatisfaction among the environmental community because of the limitation of the sample to just Ravalli County, so I think that was the main procedural problem" (Enviro Comm. 4). This agency participant summarized their understanding of the environmental community's criticism of the Social Survey: "It was too local because the NF belongs to everyone--it was too narrow of a scope and that we should have asked people in Florida, New Jersey, Pennsylvania, and California, because everybody owns

the NF” (Agency 8). This environmental community participant explains in more detail: “I think people had objections to it because there are lots of people in Missoula who care about what happens on the BNF (Enviro. Comm. 4).

This timber industry participant addresses the issue of local input and its relative value in terms of how different communities are affected by management actions:

How wide do you cast your net when you as a forest are trying to get something done in a fairly expeditious way. I think it's intelligent to proceed with good information, probably the most logical place to start is with the most local cause those are the people who are going to be most directly affected by subsequent decisions and they are the ones who are most affected now (Industry 7).

This agency participant echoes this idea in a counter to what they perceive as the claims of the environmental community:

As we talk about the type of support, we have to talk about it being community based, community of place support and responses [...] I would hope that no group would think that the forest designed that to exclude anybody else because I don't think that was the case at all. My guess is that it really was an effort to hear from the people that were most physically impacted by the fires (Agency 12).

This agency participant explains that the survey in fact was used to gather information on where community support existed, however clarifying that “actions would have been different if we would have had a community who had said 'we don't want you to do anything, we just want you to manage it by letting it stand’” (Agency 8). The idea that information can be used to support a position one way or another is expressed by this Agency participant in reference to the environmental community: “If it had gone the other way, if the majority of the respondents would have said 'don't do anything, just watch it, [...] let it do its thing', the environmentalists would have been very interested in using that report for their cause” (Agency 8).

Another fresh perspective from this timber industry participant identified a value to the social survey that hadn't been mentioned by any other participant:

I think it helps establish some benchmarks. The people that are looking at the issue without getting directly connected or getting involved in scoping or something, if they can read a survey they can kind of see what other people are thinking and see where they fall as far as what they think relative to the questions that were asked. So it might be a real confidence builder to get more people involved (Industry 7).

This participant notes that the survey could actually be used to increase participation. This perspective above also addresses the idea of public comparison of personal stances. By making available the results of the survey, the BNF would provide

the public with an opportunity to “see where they fall” (Industry 7) in relation to the majority of those surveyed. The perspective of this environmental community participant addresses the idea of availability of the Social Survey results and the dissemination of those results by the BNF:

The basic message they [BNF] came away with, presented to people, and fed back through the media was, 'people want us to do something, they don't want us to do nothing'. And they never really translated that very well and they never really presented to the public what questions they had asked during this survey, this poll. So one couldn't really tell from the media reports, 'did people say we want logging, or did they say we want soil stabilization, or we want planting?' it was that we want something (Enviro Comm. 9).

The above sentiment explains in more detail what the concerns of the environmental community were with regard to the way the survey results were presented to the public (see Section B.2.2 of this chapter). Latent in this statement of concern is the idea that the timber industry participant touched on above: the issue of public comparison of personal perspective. If the results of the survey were presented in a format that distilled down the complexity of the questions, the opportunity for learning from the questions asked and the answers to those questions is limited. Also limited, as this agency participant explains, is the ability for agency officials to decipher the specific meaning of the responses: An agency participant touches on this in the following statement about the results of the survey:

And it was overwhelming interest in doing salvage logging and seeing selective logging. Now I am not sure how people define that and [other BNF officials asked] 'well, I wish you could figure out what people meant by that because what selective logging means to you might be something different to me (Agency 6).

This agency participant shares the idea that the details of a management action is difficult to understand and describe in detail through the use of the survey mechanism. Other agency participants did not refer to this difficulty in their discussion of the social survey.

Issues and challenges with the social survey identified above were perceived in concert and generally eroded the little confidence that the environmental community may have had in the BNF at an early stage in the planning process.



#### **FROM D.4. NEPA Scoping**

*D.4.1. The 'Scope' of the Issues Identified in Scoping.* One agency participant explains the general process of 'scoping' (included here is the community conversations and social survey as well as the NEPA scoping period) as the beginning phase of the EIS analysis: "We recorded the comments we heard in meetings, we transcribed the relevant issues people gave us in letters, and we developed issues statements, and those formed the framework for our analysis. The key issues were used to develop alternatives, [...] and then issued in a draft EIS" (Agency 5). A timber industry participant comments on the issue identification and alternative development function of scoping: "Scoping issues is very important because that provides the fundament for the analysis that goes forward" (Industry 7).

However simple as this process may seem, this participant challenges this simplicity:

"Quite often those of us who comment on some of these connected issues, what happens with NEPA is that the issues raised during scoping really get boiled down and a lot of the detail gets lost. If you don't analyze all the details in issues when you are doing the analysis you lose some of the really important stuff. It kind of degenerates into the lowest common denominator issues which are most commonly brought up. (Industry 7).

A participant from the environmental community comments on the idea of a narrow range of alternatives being developed during scoping and published in the DEIS: "If the range of alternatives is way too narrow, and as I recall with this BAR project's DEIS that is what happened, then, you know, it's not as valuable" (Enviro. Comm. 9).

In what was believed to be a pro-active measure by environmental groups to combat what they feared would be a relatively narrow project focus and consequently narrow range of treatment alternatives, the environmental community drafted their own alternative and submitted it during scoping at the aforementioned meeting. This environmental community participant explains:

An extensive citizens alternative was prepared and delivered to the Forest Sup and his staff, and I believe that was early in the scoping process because we knew, those of us concerned about environmental issues, that there was a great risk of extensive environmental damage if they went about this wrong and we felt that it was incumbent upon us to present a positive vision. (Enviro. Comm. 4).

Speaking about the presentation and purpose of the alternative presented to the agency, this participant adds: "We took that alternative in some form to the Forest

supervisor and said ‘here you go, this is really something you should compare to all the alternatives’” (Enviro. Comm. 9).

Commenting on the treatments proposed in the alternative presented to the agency by the environmental community, this agency participant explains:

The citizens conservation and local economy alternative: that basically was hire a bunch of crews to go out and clear out around peoples houses, close every road that you possibly could, and let natural fires burn. That didn’t seem like much of a compromise, matter of fact, it was quite the opposite (Agency 5).

*D.4.2. The Pre-Determined Outcome Perspective.* This participant continues: “If I feel like we are listened to early on, then maybe our job becomes easier as the later comment periods come along and I might not need to put out comments on the DEIS if my views are responded to early on. Then it becomes *a game* (emphasis added) of ‘ok now it's the draft EIS comment period, I know that by law I have to raise all the issues at this point in time or I won't be able to either appeal on these issues or take them to court on these issues’” (Enviro. Comm. 9). Why does this participant think of the NEPA process that includes scoping as ‘a game’?

“It's a process that has a pre-determined outcome, and I say that quite seriously, because I think that the agency knows generally what it is going to do. And so in a more ideal world when the agency really didn't have any pre-determined outcome, I don't think any stage of the comment period would be more valuable than any other ( Enviro. Comm. 9).

A timber industry participant also brings up the legal aspects of NEPA planning as it relates to litigation strategies: “And if you haven’t got all the issues on the table, they’ll analyze something, and you know where that usually ends up, it ends up in court cause they didn’t take a hard look at all the information” (Industry 7). However, contradicting the above industry representative’s perspective that implies that the legal standing is something that is not legitimate, this industry participant has a different take:

“the best kept secret, if you will, in the entire process was the scoping area, insofar as you had instant standing if your comments in scoping were not addressed within the draft (Industry 10). He continues by tempering this idea with the following: “I had the expectation that scoping was the strongest, in fact the very strongest segment and section of the NEPA process to be engaged in” (Industry 10). And with regards to the BAR project: “I think that a lot of the analysis was done internally and if public

information that they received supported their internal premise it was fine, if it wasn't, you know, it got diminished and kind of got lost in the shuffle" (Industry 10).

Here we see members from both communities of interest perceive the scoping period, and NEPA process in general, as having a pre-determined outcome, and as a result, discussing these in terms of legal standing and the resultant strategic behavior.

Although this feeling was prevalent in the environmental community among every participant, it was only mentioned explicitly by the above industry representative.

The idea that scoping presents only vague information that cannot be commented on substantively because of the lack of specificity is voiced by this participant:

Usually the difficulties with scoping is that their information is very sketchy, a lot of times they'll send out a scoping notice and it's just such a vague proposal that you don't know like, it's so unspecific, you know the maps aren't adequate to show what's going on where, which is the nature of the beast, it hasn't been flushed out to specifics yet, but other than that, I think it would be hard to improve on because it's basically so open ended (Enviro. Comm. 2).

This participant continues: "The issue then is what good does it do? (Enviro. Comm. 2).

This agency participant somewhat agrees but explains:

We know that some people have that perception, that we already come to the public with a proposed action we have been thinking about for six months and we know what we want to do. And so we have played around with different approaches and we have tried a couple of times to say, 'ok we are thinking about, considering what might ought to need to be done on the Sapphire Front [for example] and we want people to come to a meeting and talk to us about it,' and no one shows up because it is so ify ify that people think: 'I am not going to waste my time, I am going to come once I know I have something to react to'. And so somehow we haven't figured out how to have that starting point be any earlier than something for people to react to--really make it worthwhile for people to go there. We might have one or two people show up but to really get a conversation going folks need to respond to something rather than start with a totally clean slate (Agency 12).

It seems from the above perspectives addressing the specificity of scoping proposed actions that are available for comment during the scoping period that there are some common themes that run across the communities of interest, the question then becomes: 'how to use the scoping process more effectively to address the issues that communities share'?

### **FROM D.5. Direct Contact with Forest Service Personnel**

#### ***D.5.1. Is this Mode Valuable or Not Valuable?***

This participant describes the value of direct contact in terms of candid communication that may not occur at a public meeting:

I'll say stuff in private to the FS that I would not in a public meeting, and it goes the other way too. I've been told some things in private meetings that I'm sure would not have been said at a public meeting "It has the potential of being probably the most constructive [mode of participation], especially a sort of private meeting out in the woods, field trip" (Enviro. Comm. 2).

This industry participant discusses what the content of these discussions may include:

So for the sort of sophisticated commenter, yes that one on one contact with agency personnel is very helpful in clarifying what's been said in the DEIS for instance, even what something actually means. I say clarification because once you talk to the FS people and question them in person then you can understand it and you can articulate, 'Well, you know you might have read it like this, ok, but I read it like this, and really you need to explain it like this so people understand in the FEIS exactly what the ship is and really address it. (Industry 7).

The following agency participant generally agrees on the value of these types of contacts while clarifying that these meetings do not give special treatment to communities of interest:

I think they're very good for those groups [...] and our line officers. I think it's probably fairly effective. Everybody needs to understand the rules, you know they don't get any favors, they don't get any jelly beans by doing that, but I think it's very effective. Again it's that sitting down at the table with somebody and listening and hearing, which are two different things, to what's being said (Agency 8).

This participant goes on to clarify that the value of this mode is specific to organized communities of interest and not necessarily the average unorganized citizen:

For those groups I think it's healthy and beneficial, but for the rest of the folks who don't know that they should have a group, it's pretty small, a small group compared to the number of responses that we had in the DEIS (Agency 8).

This participant goes on to compare the total number of participants in this mode to that of the DEIS relating that this form is fairly specialized—only a certain segment of the public will participate in this way. The previous industry participant alludes to this as they preface their praise with the idea that the direct contact mode is primarily valuable for "the sophisticated commenter" (Industry 7).

The following environmental community participant expresses their belief that it is a valuable experience “anytime you get to sit down with the supervisor and the ID team. But if the very *substantive* things you are talking about and the substantive alternative that you are presenting and the arguments--if they are ignored, is it valuable or is it a colossal waste of time?” (Enviro. Comm. 3, emphasis added). This perspective was common among the environmental community participants in this study—that the value of a meeting, or any mode for that matter, can be measured, in part, by how influential it can be in changing the outcome of the decision.

*D.5.2. Can this mode help to Manage Conflict?* At issue with the goal of managing conflict is the type of communication that occurs between the communities of interest and agency. This agency participant explains that:

To have a group come in and set down and berate serves no purpose and we do not have to put up with it from either side and we are getting better about not putting up with that kind of crap. And then to have their own group members call up afterward and apologize for what their group members say, you know I am not sure those meetings are beneficial at all because at that point nobody is listening (Agency 8).

This participant goes on to empathize with agency personnel present at meetings and describes the traits of an agency contact that can facilitate “meaningful” communication:

I'm sure they feel beat up sometimes, well have a field trip with a district ranger, and we'll vent. Most of them have been filtered through for their ability to absorb, listen while people with different opinions go on and on and on and on, but so sometimes they feel beat up and it's courageous for a FS ranger to go out on a field trip, either a public field trip or with Enviros or the Timber industry. I'm sure they get hit pretty hard but I think if they have the kind of personality that doesn't take it personally then I think there is good potential for meaningful interaction (Enviro. Comm. 2).

In answering the question of can this mode manage conflict, this environmental community participant echoes the point regarding a person's “individual manner”:

I think that from the forest supervisors perspective any meeting with any member of the public would be an opportunity to help manage the conflict over how land should be managed, whether or not they actually use that opportunity well or not depends on the individual manner, their agenda, and their skills (Enviro. Comm. 9).

Upon being asked if this mode can help manage conflict, this industry participant also echoes the belief that personality has as much to do with managing conflict as anything else:

It can be, but of course like any one on one contact, its personality driven. So it is all based on the relationship you have with that person so if you've got to know somebody quite well, those are the ones your probably going to call.

This participant mentions directly the issue of changing forest service personnel which will be discussed in greater detail in the following chapter.

And if it's somebody new, and you know this is another issue in the agency, the sort of revolving door, you know you have a new forest supervisor every six months that can be a very big issue with everything in general, trying to keep continuity in staff and keeping the relationships that are very important (Industry 7).

#### **FROM D.6. Public meetings or 'Open Houses'**

*D.6.1. Why the Open House Format?* The following comment represents the thoughts of three participants, one from each of the three communities interviewed, on the value of the DEIS open house: "They are useful as a form of disseminating the information from the agency back to the public, that is valuable" (Industry 7). This basic function of the 'open house' was considered valuable by all participants regardless of community of interest affiliation.

A perspective common to the environmental and timber communities is the idea that these open houses are not valuable as a form of two-way public dialogue--for learning purpose—unless public question and answer sessions are provided. This participant's perspective explains part of the story:

It's become a favorite technique of the FS, and in my opinion it's become a way to limit the dialogue. From their perspective it limits the amount of confrontation. From a public dialogue perspective it means you don't get to hear anybody else, you don't get to hear your neighbors, you only get to hear what the FS has to say in that kind of format (Enviro. Comm. 11).

Adding to this idea is the following relevant perspective from an environmental community participant:

I think there is so much more potential for learning and expressing points of view that are not easily expressed in just a little three minute blurb or something, very infrequently is there time for that, things aren't that simple, it is a complex deal. So it can get really frustrating that way, and I think that's one of the reasons that it tends to turn into this exchange of rhetorical statements, it's not really a conversation (Enviro. Comm. 2).

One agency participant acknowledged these concerns: "Our public meetings were too facilitated, there wasn't time, there weren't opportunities for people to stand up and make speeches...yeah, that was intentional" (Agency 5). An industry participant, referring to public meetings that have been held in the past, notes that the agency "heard

comments from those who are the most vocal and who aren't afraid of speaking in public, or who are very articulate, or thirdly, have extreme beliefs or passions about a specific place or time, but your not hearing it from the majority" (Industry 1).

Although the DEIS open houses did not allow for group questioning of the BNF officials, the format did allow for public dialogue in the form of one-on-one discussions. The format was intended by the BNF to, "get people talking together, and provide them with opportunities to talk to us" (Agency 5), only not in a group setting but on an individual basis.

This industry perspective refers to the traditional hearing format as valuable in this way:

Now an actual hearing where people deliver testimony which they can do orally and it gets captured, that can be a genuine engagement vehicle for folks who aren't inclined to write things down. But often this kind of shift to these open house type situations, there isn't that opportunity, so they are somewhat of a functional waste of time, if there is an organized hearing where they take public comment in a formal manner might be more useful to get those thoughts from people who wouldn't participate otherwise (Industry 7)

Adding a level of individual responsibility to the discussion of whether the open house or general public meeting has potential to manage conflict, participants from all three communities interviewed agreed that "it's more likely that different people will use that medium as an opportunity to convey whatever messages that they showed up with" (Industry 1). Another industry participant went on to say that, "there are some people that show up to these thing with the intent of disrupting them. So they get all the attention" (Industry 7). The following participant discusses a public meeting held by the agency on another controversial topic and noting that the facilitator was a key piece of the format: "The FS had one on the roadless area which was just this nasty, nasty just shooting personal attacks back and forth, the facilitator lost control of it, you know, so we are picking on all of our old enemies, it's very emotional, no content" (Enviro. Comm. 11). As a legacy of conflict surrounds public meetings, this participant attempts to understand why the Agency shifted the format:

I know from a personal human perspective that the FS just wants to go home, they just want to get this behind them. They don't go into it thinking they are going to learn anything, and they don't. And they come up with designs with how to turn it so it's the least hassle for them and they do not design it in the way of actually learning from listening (Enviro. Comm. 2).

This perspective underscores the industry's desire for direct modes of participation with decision makers: "From an industry perspective, those public open houses are a waste of time. In fact the industry has said many times that if your going to have an open house, were not going to bother to show up, if you want industry's input, call us, we'll show up and tell you what we think" (Industry 1).

#### **FROM D.7. Field Trips During DEIS Comment Period**

The perspective of this environmental community participant captures a theme that was mentioned by participants from all three communities during the discussion of field trips and their value: "

[The BNF proposed to] do a little salvage experiment on a couple acres, sure, lets go do what you think you are going to do. In fact it was a great idea on there part, I give 'em credit for that. Let's go look. Of course we went and looked, and we vomitted, in fact I have a picture of it somewhere, I used the picture! But actually that's a good idea, it's a good idea to say 'OK here is a small version of what we want to do', it helps create the dialogue; we actually went out there and had very civil dialogue, but disagreed (Enviro. Comm. 11).

An agency participant describes the field trips for the BAR from their point of view:

In my opinion, the best public involvement always happens when your looking at real trees or real snags or real rocks or real roads, I mean, it's way more effective than in some hall somewhere, but unfortunately those weren't real well attended, people that showed up already had their mind made up (Agency 5).

This sentiment is echoed in this industry participant's perspective on field trips:

I think the focus always has to be what happens on the ground. And that's really where everybody looses sight in this public involvement process. When you go out on the ground it's very rare that there is a huge disagreement as to what the right thing is to do. (Industry 1).

This environmental community member agrees voices an additional function of the field trip format:

I think it definitely helps if you are ever going to reach an agreement, but even short of reaching an agreement, it helps with understanding and allowing for non-agreement, and if nothing else, short of rage and hostilities, it helps realize 'hey real people see things differently. (Enviro. Comm. 2).

It seems from these perspectives above that these participants from all three communities generally appreciated the opportunity to have a dialogue outside in the field. Areas of disagreement as to the specific value of field trips center around whether or not



people on the field trip will actually agree or not on the ‘reality’ of the situation before them.

Interestingly, a similar perspective was expressed by many participants, regardless of community of interest affiliation, with regard to the value of field trips for ‘ground truthing’ their perspectives. This participant comments on this function as they describe a scenario on a field trip:

[The BNF] made this change in the way they were going to skid, 'yeah the ROD said that we were just going to skid this on frozen ground but we decided, our geologist came and looked at it and said that the soils weren't too sensitive and steep and so we changed it to summer skidding without frozen ground because our experts felt like that it wouldn't cause any problems.' And we are going, uh hum, but it did, look, this skid trail would not have been there had you stuck with the initial plan. So it's so often that when they spout their rhetoric in front of reality the contrast between reality and what they are saying is right there, where as if you are down in a room and we would heard that same thing well you just kind of breeze on to the next thing In terms of getting closer to the truth on the ground, there is nothing like field trips (Enviro. Comm. 2).

An agency participant notes the same function of field trips while describing the value of the field trips held by the BNF for the BAR:

I think those were pretty effective, first of all, I think that it demonstrated that it wasn't going to be environmental Armageddon like some of our critics were claiming, that we could do a good job of protecting soils and leave the best snags for wildlife, and reduce fuels and provide raw materials for our forest products industry (Agency 5).

These two participants' perspectives are essentially the same with regard to the value of the process. They differ drastically with regard to the actual value of the treatments—the outcome—and what the ‘reality’ of the situation actually is.

This agency participant continues to discuss the idea of how the field trips were valuable in a similar way that the above participants express—to “keep everybody honest” by showing everyone what is happening on the ground, however. Conflict management, according to this participant, is not accomplished through the field trip dialogue because of the lack of willingness for the ‘sides’ to change their minds.

But there was a couple of times where we had both sides together on a field trip and so they listened to each other during that time, but there was nothing there to resolve any sort of conflict, I mean nobody changed their minds when they were done or were even close to changing their minds about anything, but at least again they were with each other and saw each other. It's the practice to let people see what we are doing on the ground, from both sides, keeps everybody honest as to what's happening and what's not happening. And the way to do that is to see what is going on on the ground (Agency 6).

The value of the field trip that is common to most of the participants that discussed field trips in detail was the simple conflict reducing effect of being outside,

regardless of the level of agreement about the treatments being viewed.

### **FROM D.8. DEIS Written Comments**

#### ***D.8.1. Agency Perspectives.***

Written comments are often the most meaningful, there are all these filters that we humans have when we listen to somebody and capturing an issue when presented in verbal form, may not be as effective or efficient. When somebody gives you written comment you can read that, re-read it and highlight the things that really stand out as issues, it's a very powerful, when it comes to NEPA it is probably the most powerful, it's for the record and documented in those person's own words. When people sit down and write it they do a better job presenting their cases more clearly and that's important, so you can dissect it, by dissecting it I mean using this process of content analysis. [...] Well, manage conflict, I am not sure, do you mean manage the process, it's structured, that's the value, it's very structured, I mean, you have a stack of papers over here, and you go through them and process the comments and assign them to folks, and you think about them and you ask 'ok how does that fit', and document your responses to those comments, like we are required to in these (pointing to EISs). And that's how it's managed (Agency 5).

“We always get written comments that point out information that we may be lacking. I think it is a great checks and balances for us” (Agency 8). However, as with other modes of participation, this stage in the process can be ‘corrupted’ as it is used in a strategic and political way by the communities of interest:

Form letters that, say 10,000 form letters, that say the same thing are not valuable at all. But again it's a process that people can, internationally if they want, can find out that there is a project going on, supply comments, and we review those comments, so I think it's valuable (Agency8).

This agency participant goes on to elucidate how the comments are used in the development of the alternatives and EIS in general: “well basically it is based on the frequency of how many people have those sorts of issues, i.e. going back to our democratic process, what does the majority want” (Agency 5), though this participant continues to clarify that:

It's not a formal vote, but in a sense, again, we are in a majority rules system, it wouldn't be right for the BNF to do some work out there that the majority of the people in the US wouldn't support. So it's always a challenge to try and sense what that is. Again, the people who submit comments, i.e. vote, tend to have a set of values either on the commodities side or the amenities side of the values scale, and those are the ones who are most motivated to provide comments and if we just looked at those, if we just tallied those up and used a vote system, it would be whoever could garner up enough horsepower to get the most comments in, you know, that wouldn't make sense either (Agency 5).

The following agency participant compares the social survey mode of pp to the NEPA process and touches on the ideas above:

And so it's kind of a balance the FS has because participating in a project in the NEPA process is not a vote, you know we get 10,000 letters that say don't do something and we get 20,500 letters that say do something, you know it's not a vote, but it does give us a feel for what is out there in the community and how successful the project might be (Agency 8).

*D.8.2. Environmental Community Perspectives.* This participant from the environmental community places value on the following basic technical informative function of the DEIS written comment process:

Obviously the DEIS comment period allows you to look at all the alternatives and tell whether you agree with the analysis or not, and tell them why they needed to look at a different alternative or consider a different analysis of any of the alternatives, and I think that is particularly important (Enviro. Comm. 9).

However valuable on this basic level, the perspective of this environmental community member challenges the legitimacy of the Agency's use of the written comments:

If you define valuable as how influential are they, as a result of the written comments of the Draft EIS and the analyses that I did, instead of cutting un-inventoried roadless areas, which is one of the areas I focused on developing written comments on that, they had to respond to that and analyze those areas as part of the final EIS, it was adequate, they had to address it, but again it was kind of the address it don't deal with it, cover the NEPA bases but don't really deal with the substantive underlying issues, I don't think it altered their perception a whole lot. I think the issues about bull trout did alter their approach, and they did modify the Final EIS and ROD which reflects some of those issues. So on that count I'd say 'yeah we made some progress' (Enviro. Comm. 4).

This participant ends by conceding that some substantive issues did get addressed through changes to the alternatives published in the FEIS. Many in the environmental community, including this participant above, voiced their concern that written comments rarely made a difference in changing the alternatives:

The FS can gather facts through the written comment process, and once again it's what they do with those facts, what they do with those comments that leads to an improvement in, leads to less conflict or to more conflict but the question is 'how do they want to use them?' (Enviro Comm. 9).

This enviro. Comm. participant voices similar perspective for the value of substantive comments:

I think the substantive comment idea is appropriate, the rule is essentially that the agency doesn't have to respond to any non-substantive comments, and I agree they shouldn't have to respond to that, I think environmental groups and I bet you the Timber Industry just for one example, most relevant in this case, gives them plenty of substantive comments, the real question is does it have any impact. More and more the responses that I see to substantive comments that are filed are particularly non-substantive in their

content, they basically say well we looked at that thank you for your concerns (Enviro. Comm. 4).

This environmental community participant's thoughts on how the agency uses the comments may explain some of the difference in perspective on this issue:

It made a difference in their rationale, it didn't make a difference in the outcome, it just made a difference in the rationale, they had to change their rationale, but it didn't change what they did. So we spent all our time going 'round and 'round on the rationale for something that they had already decided on, and that's what took them time. Our draft comments covered a wide range of issues very thoroughly. They picked about three of them that they really had to go work on. The only reason I can think of for picking them is that it was their legal judgment about what would get 'em [in court]. They worked on their rationale but they didn't change anything substantial in their decision (Enviro. Comm. 11).

And on the issue of whether the comment process should be seen as a vote:

It's amazing to me that the FS says that a form letter doesn't count as a comment, when you go to a ballot, when we have our election, that's a form letter, do you have to provide substantive comments for why you want to vote [the president] out of office? These are public lands, if somebody sees a comment or a set of comments or a post card that they believe in that they want to sign their name to, they sure have a right to do that, so again 4400 people did participate (Enviro. Comm. 3).

*D.8.3. Industry Perspectives.* The following perspective from an industry participant points out an inherent issue with the kind of comments that the agency gets on the analysis and how the comments again can be substantive or emotional:

Well it is, it's probably the most valuable way to participate, but there are only going to be a few people who do that, because to participate effectively you've got to analyze the whole thing and that takes a huge amount of time and effort, and I think most members of the general public are not going to be interested in viewing a three volume set, trying to tease out the salient issues from it, so I think once you get into those levels of analysis, there's a lot of the public that are shut out from that just because of the time and effort it takes to participate effectively in something like that (Industry 7).

This participant mentions the inevitable narrowing of the participant field as this project planning proceeds towards a decision. What this participant mentions that is particularly germane is that the kind of analysis necessary on the part of the public to participate at the DEIS stage—either by submitting written comments or writing a comment during a public meeting—is intensive and largely technical in nature rather than value based. To really write substantive, specific, and often technical/scientific comments the public participant must be extremely well versed in the documentation that is the basis for the analysis alternatives. As this participant identifies, there are only a

few people that participate at this level of the analysis—largely the two communities of interest of the timber and environmental communities.

One industry participant voices similar dissatisfaction to those in the environmental community on the issue of how the agency failed to meaningfully consider this participant's written comments in developing or changing the analysis documentation, nor did they comply with the mechanics of the law which require a response to comments indicating that the BNF did not respond to their comments after having submitted them during scoping and draft EIS comment periods. According to this participant, the agency failed to respond to the comments submitted even in the Final EIS. Speaking about the comments that they submitted:

It was utterly and totally ignored in the draft, was not in the bibliography, but instead they used their own in house quoting himself as saying if your going, the risk for soils is extreme, and the only way that you can do some harvest around hear and not cause damage to soils after it's been burned is that you are on frozen ground or so much snow, and they utterly ignored the data that I put in. I am just showing you right now the North Fork Payette post fire monitoring report of 1996, which I submitted a full copy of to the BNF and it's not in the bibliography, and I complained about that. And they said, 'oh well we understand that you did that, and well we looked at that'. And my response was, 'then why the hell didn't you put it in the bibliography, you put every other thing in there?' You can go to the DEIS yourself and the final and you can look through and look in the bibliography, and you will not see the report of the post-fire monitoring of the N fork of the Payette. You will see an internal report of the local forest soils expert of his observations that was internal that had not even been peer reviewed. I am not real impressed and at this point in time I do not believe that the public input was honorably considered (Industry 10).

This participant obviously felt that their specific, substantive comments were not used in the analysis process. Their reaction to the apparent dismissal of the comments submitted:

I was prepared to sue, I was prepared to appeal the implementation, I was seeking the approach of appealing that section, not trying to stop the implementation of the rest of the plan, but only challenging that aspect, but before the appeal time closed it went to litigation and I got screwed (Industry 10).

### **FROM D.9. Administrative Appeal**

*D.9.1. Can this mode help manage conflict?* Upon being asked if appeals had any role in conflict management, this industry participant defines the process both as a way to inform the agency of an issue they may not be aware of, although this is rare, as a "reminder" of sorts as well as a the opportunity to make the agency "pause":

There are probably a few minor situations where it has served that purpose. When someone was not aware of a concern out there or a level of concern was bypassed or

ignored or overlooked. So in that light it serves as a reminder. As far as the value of appeals, it provides individuals an opportunity to cause the FS to pause before they make their final decision and it provides them a medium to communicate whatever their real concerns are. If you were managing that situation you would already know who has concerns about what, and you would have those conversations and be able to explain exactly the rationale and which direction your going and develop some level of trust between those individuals or those individual groups and the decision maker. (Industry 1).

This participant goes on to add that if the goal of a public participant is to notify the agency of a concern that had not yet been considered by them, there are other ways to accomplish this:

What's also true is that a phone call does the same thing and it's a whole lot more personal and a lot easier to resolve in that manner than it is to resolve something in writing (Industry 1).

This participant continues to add that the problems with the appeals process are not necessarily the doings of the agency:

What gets in the way is if that's the business you're in. If you're in the business of litigation or appeals then that's a little different. Some of the comments I hear from some of the Rangers about different environmental groups is that they really don't have any, they have a laundry list of concerns and they share that. And so the FS is trying to work out 'ok what is it that we should modify or what is it we can work out that you really have an issue with and see if we can come to some resolution'. And their response often is 'well really nothing, because it's what we do', and that's not true 100 percent of the time (Industry 1).

This industry participant also raises similar concerns:

Certainly, I think if they've got a substantive issue with the FEIS and the decision, yeah, but it needs to be somehow a genuine issue, and then it needs to be resolved in a fairly expeditious manner. And if it can't be resolved, and there is a genuine issue, good, we caught something that slipped through the cracks and really would have made a big difference so from that standpoint it's probably a good thing (Industry 7).

This agency participant, while voicing a similar basic value of the appeals process qualifies their perspective by making the distinction between real and "frivolous" appeals:

Encouraged to appeal? (Pause) Yeah, although I think there are some people out there who probably do it rather frivolously, do it every, virtually, every timber project in this, the vast majority if timber projects of any size, true also of our range projects, get appealed, as well as some other categories of projects. We have a good track record of being upheld in administrative reviews. A lot of times it's 'well you didn't analyze this', but we did, they just disagreed, again, we listened to you, we just disagree (Agency 5).

Upon being asked if people should be encouraged to appeal, this agency participant had a mixed response:

And I think generally speaking the appeals process has its part. There may be something that we didn't see, so checks and balances are in place for a reason and that's why we have the appeals process. But what we have gotten into now is everything is appealed, there's normally a restraining order, a stop work order, and so I think it's become more of a process now just to continue the delay of implementing work (Agency 8).

The delay tactic this agency participant speaks of was of particular concern for the agency due to some of time considerations that were discussed earlier in this chapter:

The only thing the appeals process would have done is add more time, another 105 days minimum. And we designed a project that [...] required that much of the logging be done over snow covered or frozen ground conditions and that winter we needed to get some of it done, otherwise it was going to be further deferred to the following winter with that much more product deterioration and further disabling us from being able to meet our fuel reduction goals. So we saw it as critical to having a startup that winter of '01-'02, so that's what really...there was a timing issue that needed to be met, and if we would have gone through the appeals process, we would have lost that window. So since we are going to court anyway, why don't we go directly there (Agency 5).

And furthermore:

I: Is there some sense of frustration when a project that you have worked hard on gets appealed?

R: Oh, a little bit. But I am so used to it, I fully expect it.

I: Is it that you expect it so much that it doesn't take on the same significance because you are saying that a lot of it's a laundry list of cut and pasted, generic appeal points? You don't take it personally because it's not so specific to the project?

R: Yeah, if a paid professional gets paid to sit in an office and work on issues. (Agency 5).

The agency's solution, according to the above participant, was to go to court without administering an appeals process for the BAR.

*D.9.2. Is the Appeals Process Valuable?* This environmental community participant mentions the value of the appeals process and is representative of the perspectives of the environmental community participants in this study:

There are however, other people have the experience where the appeal is granted, which avoids litigation and the project gets redone, and there are other times where they reach a settlement on the appeals, without having to go to litigation, so there are advantages to the appeal process, it's not just a mere formality (Enviro. Comm. 4).

This is echoed by another enviro comm. participant:

I have seen the appeals process avoid litigation. The appeals officer said 'go back and talk', 'really, ok', 'you are not going to pass the test in court'. If the appeals officer really looked at it and said 'you're not going to pass the test in court, go back and talk', then you would avoid litigation (Enviro. Comm. 11).

The above participant ends this idea while acknowledging: Yes, sometimes it is a mere formality and in the BAR case my opinion was 'let's get on with it' (Enviro. Comm. 4).

Willingness to actually negotiate during the appeals process is certainly dependent on both the appellant and the agency. With regard to conflict management, this agency participant voices their perspective regarding the likelihood of an appellant actually "changing their mind":

It would be interesting to find out how many appellants actually change their mind, I don't think the percentage is very high once they get into the process of appeal. The line officer has to make contact and ask the appellant if they want to meet. And the appellant doesn't even have to meet with them if they don't want to, they can say 'no we don't have anything to discuss', and that satisfies that requirement. An attempt was made, it appears, to try to come to some [resolution], but when the appellants say 'no we don't have anything to talk about', or 'you know I just can't meet any of those dates', then check that off the list as to things that are done and on to court (Agency 8).

So it appears from this participant's perspective, that there was some acknowledgement on the part of some in the environmental community that the court was a final destination for the decision. This issue will be discussed further in the following section on litigation.

An additional value of the filing of an administrative appeal, according to this participant, is the review that occurs at a higher level of the agency as a result:

By now, at that stage of the proceedings, everybody pretty much knows what everybody else is about at the local forest level. The real value of the appeal is when it goes up to another level that hasn't seen it before and they have to make a decision about what to do with it. That's the real opportunity in the appeals process in most cases--for some internal review within the agency that says, 'well wait a minute, what are they doing here locally'. And that's probably pretty appropriate when you are managing a national resource (Enviro. Comm. 4).

However, this participant adds a counterpoint: "in the appeals process, the FS is the Judge Jury and Executioner" (Enviro. Comm. 3). Interestingly, this participant from the environmental community also voices the lack of value of the appeals process due to the late stage in the decision process it occurs. This participant goes on to comment on the legal response that the agency is required to provide—an appeal resolution meeting:

The sense enviros have about the appeals process, generally about the appeals resolution meetings is that they are a waste of time. Appeal resolution meeting, if it's gotten to the point of appeal you have told them what your problem was with it several times now, and the local forest is generally decided that for whatever combination of reasons that they are not going to agree with you, so it's not surprising that the appeal resolution meeting



although required doesn't often result in much. I have been involved in appeal resolution meetings where there has been some negotiation but it hasn't resulted in negotiation but the negotiation I think is helpful (Enviro. Comm. 4).

And on the issue of elimination of the appeals process, this enviro. Comm. participant believes:

There should be an appeal process, it allows the agency itself to check its decisions, to review its decisions, make sure they're good. The FS, once again, had a pre-conceived notion that after they made their decision that everybody had reviewed it already--it was fine. They didn't want to hear the public's final say so on the actual decision. I think the public has an opportunity to once again and finally say these are our list of issues during the appeal process that should be considered, narrowing that down. Without that opportunity the FS has to go back to every issue that was raised throughout the public process and the comment periods and consider those as likely issues that somebody could litigate on, so the FS itself by bypassing the appeals process simply left the door wide open for anybody who had ever made a public statement about this project that got somehow in the record, to raise those issues in litigation whereas if they would have had an appeal period, people--if they really were serious about their challenge or their concerns about the project--would have then put that in an appeal narrowing down their issues (Enviro. Comm. 9).

This participant also alludes to the legal standing function of the appeals process in their response to the question of whether people should be encouraged to appeal:

They should be encouraged to use the appeals process, number one because that keeps them standing to actually ask somebody outside the FS at a later time to make an impartial judgment about the legality of the project--that is the federal courts. If you don't appeal you don't get to go to the federal courts (Enviro. Comm. 4).

A major discrepancy between all the communities of interest participants in this study exists over the time it takes to process an appeal and the reality of the use of appeals to delay projects, especially salvage projects as mentioned above. Interestingly, the following perspectives on this issue vary according to community of interest affiliation as well as within communities of interest.

Regarding the issue of timing or possible delays incurred through the administration of the appeals process, this environmental community participant had this to say in response to the question of whether people should be encouraged to file appeals:

Why not, you know it's no more a bump in the road for the FS than having scoping period. In terms of it slowing down the particular project, it won't, unless what they are doing is illegal. If what they are proposing to do is illegal it has the potential for slowing it down, but even then it may not. In other words, if it's a legal project, appeals aren't even a bump in the road--they can read through it as quickly as it takes them to read it, stay up late that night if need be. If there's nothing to it, deny the appeal and if there's something to it then thank god somebody stopped you from doing something illegal (Enviro. Comm. 2).

But industry participants generally agree that the environmental community uses the appeals process to strategically stall projects, especially ones as time sensitive as salvage sales:

The whole thing can add up to 105 days, so folks who don't want something to happen because that's their win--if nothing happens--can use the current process to do that quite easily. As long as you've saved up a few significant issues that you didn't tell anybody about the appeal is remanded. (Industry 7).

This industry participant explains in more detail the effect of a time delay on salvage sales combined with restrictive treatments:

And if we were talking about green wood, an old commercial timber sale that we used to have, an extra 120 days wouldn't have any impact, I agree, but on salvage wood, it makes a difference, salvage wood with esoteric logging systems, or really restrictive, So all of a sudden your time frame may only be sixty days, and if they delay the project through the procedural route that it doesn't get advertised till sometime in December, the bid opens at Christmas, it ain't going to be logged that winter, their little delay just put on twelve months, it's not necessarily just a four month delay. So it is disingenuous when [the environmental community claims appeals do not delay projects]. It's either disingenuous with malice or because of a lack of understanding, but it is disingenuous (Industry 10).

At issue here is whether or not a delay in implementation due to appeal is the fault of environmental groups who appeal or the agency who administers the process.

This perspective from an environmental community participant indicates there is a relationship between the issue of how long it takes to process an appeal and how seriously the agency takes the appeal. This participant places the responsibility for efficient administration of the appeals process squarely on the shoulders of the agency:

Now what they did a few years ago is they made the appeals process much more efficient. I think this idea of the appeals process taking a bunch of energy is a bunch of baloney around here, because I know people who spend all their time up in the regional FS in a group figuring out how to make it efficient, and I watched them make it efficient--how to deny an appeal quickly. Well, if you are just going to do that then it really has no meaning except to add twenty or thirty days to the process. But if they really looked at it and said, oh gee these guys did get us, let's go back and talk, which they had done when they first passed the law, then you would avoid litigation. So like anything else it depends on how it's implemented (Enviro. Comm. 11).

This industry participant voices their concern for the same idea—that the agency has control over the time it takes to process an appeal, regardless of the appellant's intent in filing it. Consider this section of the interview transcript:

R: Is it necessary to delay project, I think there are some folks who would like to see, especially when you are dealing with salvage let's say, it's a perishable product the longer it's delayed the less that's going to happen, bottom line. So having the ability to delay it helps accomplish their objective. It doesn't get them the whole way but it gets them part-way, and then they have to make the decision whether they want to go to court, so the response time on the part of the FS in an appeal I would say it should take no more than a

few days to actually respond to an appeal. Meaning you gather up those who have the concern, have a sit down with them, see whether their claims have merit or not, what they are truly interested in, and make your decision. It does not need to be 60 days or 90 days and the bottom line is what they always do is wait till the afternoon of the last day before the FS issues their decision. I think that's way too much time. Most people they use whatever time, if you've got 10 days they'll use 10 days, if you've got 40 days they'll use 40 days, if you give them 2 days it'll be 2 days (Industry 1).

I: The agency does that your saying?

R: Yeah, and I think that's true in school too right?

I: Yes.

This perspective from an environmental community participant alludes to the amount of time it took for the entire analysis and again places the responsibility of efficient administration upon the agency. Speaking about the post-decision stage of planning the BAR:

Now you have a big emergency and you don't have time for the next thirty days for an appeal, wait a minute. It was in your hands ninety percent of the time--over a year--and now you are arguing about the last thirty days? If the appeals process, if it's done end to end I think it is 45 days or something and they take forever to get their analysis done. I am surprised at how slow it is sometimes when I see the outcome (Enviro. Comm. 11).

Referring to the ability of an appellant to stop, not simply delay through forcing a lengthy review, but actually stop a projects implementation, this environmental community participant has this to say:

People have this impression that this 35 cent appeal, all you have to do is mail in an appeal and you stop a timber sale, it's like, that's bullshit, like I said, you don't win an appeal unless you got them dead to rights legally and scientifically and you have credible threat to take them to court and then maybe you'll win an appeal. Otherwise far and away most of the time what happens is that you just show them where there are holes in their boat and they plug 'em up and continue on. There is a set period of time, I mean it's in their hands, when you hand in an appeal, there is nothing that says they have to wait sixty days or ninety days. They can, in the return mail, say 'forget it, we deny your appeal' (Enviro. Comm. 2).

What effect did the elimination of the appeals process have on the public's ability to have continued participation in the post-decisional planning or implementation? The following perspectives from all communities of interest paint a varying, mixed picture of the results of the bypass of appeals.

This participant from the timber industry surprisingly states: "I was prepared to appeal the implementation. I was seeking the approach of appealing that section, not to

stop the implementation of the rest of the plan but only challenging that aspect. But before the appeal time closed it went to litigation and I got screwed” (Industry 10). This participant continues to voice their concern over an issue relative to appealing a decision that the agency claimed would delay implementation of the entire decision. This industry participant explains:

I was struggling with the desire to challenge this woeful dropping of the ball. I mean you want to talk about credible input, I just showed you [substantive comments on EIS], and I was looking at that saying ‘how can I deal with this to improve the product without impeding what we’ve got’, and that became a challenge because one of the pieces of leverage that was being thrown against me [by the BNF] was ‘if you appeal, we have to stop the implementation if there is an appeal’ (Industry 10).

This participant indicates that, through discussion with the agency, they had a difficult time deciding whether to appeal because of the lack of ability to change the specific part of the project without stopping it entirely.

Not only was this participant’s opportunity and desire to appeal thwarted by the elimination of the appeals process, but other groups, according to the following enviro. Comm. participant, were also planning on filing appeals until the process was officially bypassed:

In that situation I think an appeal might have been pretty informative, actually during that time period some folks from the John Muir Project did come out and I was on a field trip with them and I learned a lot, their main issue is the survivability of burned trees. I think if there were an appeal process that they would have supplied a whole bunch of good science on that particular issue which needs to be opened up (Enviro. Comm. 2).

## **FROM D.9. Litigation**

### *D.9.1. Is Litigation a Valuable Way to Participate?*

In response to the question of whether or not litigation is a valuable way to participate, this agency participant replied: “Well, it has its place. If somebody feels strongly enough that they are willing to hire lawyers and go to court, that’s their right. Sure it has value, if I am so disgruntled about something that I couldn’t stand it, I would go get a lawyer too” (Agency 5). This participant from the environmental community speaks to the governing principles behind litigation:

I think what’s interesting to me is that we have a way of resolving disputes in the US and that way of resolving disputes includes generally several steps, but ultimately the court are there as a backstop to make decisions when people feel that there are still serious problems that need to be resolved one way or the other and they can’t come up with any kind of collective decision (Enviro. Comm. 4).

This industry participant also generally agrees that: “all actions must be able to stand the test of litigation because we are a nation of laws and if someone feels that the laws have not been followed, well then they have the right to seek redress in the court, I would never challenge that (Industry 10).

However, participants in all three communities admit that there are costs to this avenue of participation as well. Referring to the avenue of litigation: “It's become a costly one and a time consuming one so I think people justifiably seek ways to avoid going to court” (Enviro. Comm. 4). Concurring with this sentiment is this agency participant: “Nobody likes to be sued. I mean, it's expensive, it's not a lot of fun, it's contentious, I don't think anybody likes it including the plaintiffs, it wasn't any fun for them, quite painful actually” (Agency 5).

*D.9.2. Can Litigation Help Manage Conflict?* In response to the question of how litigation helps manage conflict, this participant from the environmental community places value on the opportunity for the courts to help resolve basic disputes:

But ultimately this whole thing that you're somehow bad if you go to court to resolve a dispute, you're somehow un-American or something is ridiculous because our constitutions at the state and federal level provide for a court system is the ultimate decider of disputes between people. That's how we avoid going to war with rocks and sticks with each other, it's a basic dispute resolution mechanism (Enviro. Comm. 4).

As was brought up in the discussion on the use of appeals, the question of intent on the part of plaintiffs, in this case environmental groups, is central to answering the question of how valuable this mode of participation is and whether people should be encouraged to participate in this way:

You know it goes back to if they feel what they are doing is right. If they truly feel that justice has not been done and they've gone through the whole process then they need to litigate. But there is a great chasm between litigating because you feel strongly that truly there is something wrong with the project and just to litigate because by God not one more project is going to go forward and you don't care what it is. To me that's not caring for any resource that's caring for a personal issue that probably is getting in the way of caring for the resource (Agency 8).

The above agency participant notes the same issue as in the discussion of appeals—if litigation is simply used as a strategic means of stopping the implementation of a project regardless of the project's merits, then it should not be encouraged and generally then lacks value.

This participant goes further to say that there is a financial dis-incentive for the public to seriously consider the option of litigation before participating using this method:

[If you are a plaintiff] you don't have anything to lose because the government is going to pay for our attorneys and the government is going to pay for the litigants attorneys so there's no cause and effect there. There is no accountability or responsibility for actions--there is no loss. We paid the attorneys fees for the BAR to the tune of 200-250 thousand, something like that just for the BAR. Taxpayers should not have to pay that (Agency 8).

The following industry representative goes on to suggest a solution to what these participants perceive to be not only a dis-incentive to cautiously proceed to court and lack of financial accountability, but also an actual incentive to litigate:

I would suggest to you that the use of the litigation to challenge this would dramatically stop by the revocation of the equal access to justice act, because I would submit to you that there has developed a core of litigating attorneys whose sole income is awards for damages and their court costs representing fairly radical conservation groups that really don't have the money themselves to finance the litigation, it's going pro-bono on the expectation that hey if they win, they get all of their fees paid back arbitrarily by the judge, and if you go take a judge that is perceived to be fairly green weenie and there are courts around that have that perception, the settlement amounts that are granted are huge, and you should check out how much settlement moneys were granted on this, I would suggest to you that since you see the same lawyers doing it time after time, the real truth of the matter is that they don't win a whole hell of a lot of times, their challenges are so scurrilous at times that they get rejected. By the way you get no money back on an appeal, an appeal is just a step to go towards the pot of gold at the end of the rainbow, but if you lose three out of four, five out of six at the rates that have been reimbursed, they are still making money, and so from my aspect and sense of ethics, that don't smell real good either (Industry 10).

This participant clearly insinuates that the environmental community's legal counsel can effectively be seen as "being in the business" of litigating. This idea was expressed in the discussion of the filing of frivolous appeals by industry and agency participants equally. We can see this same pattern here with regard to agency and industry participants' perspectives on litigation. As if responding directly to this claim, the following environmental community participant opines: "the upsurge in environmental litigation is no greater than any other upsurge in other types of litigation that the federal courts see. You look in any category and they've seen more litigation" (Enviro. Comm. 4).

Also countering this argument is the idea, as expressed by the following environmental community participant, that the environmental community's track record in court is both consistent and a winning one, at least at the local level, because of agency negligence:

If we had done frivolous lawsuits we wouldn't have such a great litigation record, which we do, and most groups, if you look at it, it is that way. If they weren't breaking the law we wouldn't be winning because the barrier is high. Get rid of the political rhetoric--if you have ever been there the barrier is high (Enviro. Comm. 11).

The litigation record of the plaintiffs of the BAR project aside, this environmental community participant goes on to explain in more detail the idea that the "barrier is high":

When you go to court the presumption is that the agency is right. If there is an argument between what their scientific judgment is and yours, guess what, the court, specifically the case law interpretation of NEPA is that the agency has the discretion to believe their expert. So you have to prove that they are wrong. This requires a very high level of proof to win a NEPA lawsuit--you have to prove that it was arbitrary and capricious. This means that if they took a reasonable look--even if they made mistakes, even if you bring in an expert that disagrees with them--you are going to lose. You have to prove that they did something arbitrary, that they had big glaring mistakes, that they completely ignored things--whatever the standard of arbitrary and capricious. So they are really hard to win. And the fact of the matter is, at least in this area, I don't know any group, name a lawsuit that was frivolous, I don't think you can name one, you know, give me an example cause I don't know of any (Enviro. Comm. 11).

Adding another twist, this timber industry representative takes issue with the idea that environmental groups have a difficult time in court and, similar to the above environmental community participant, mentions that the case law contributes to their ease of victory. Although the barrier may be high for winning NEPA lawsuits on substantive issues, the procedural aspects of the law, as this participant states, are the ones that environmentalists sue on, and win:

With litigation, the NEPA is a procedural statute so there's always going to be some little thing that doesn't get done or something didn't get done quite enough, you didn't take a hard enough look at this issue. I mean we've seen all those court cases and they have created this bug record of law which creates a very different gradient of success when you go to court (Industry 7).

This participant seems to imply that the "different gradient of success" occurs because the case law that has accrued makes success easier in court rather than in the NEPA process, presumably for the environmental community who primarily litigates on procedure, however. This participant goes on to say that:

What's been interesting this year there have been a couple of forest industry lawsuits, probably the most notable one is the northwest Forest plan litigation which has gone back the other way because the plan wasn't getting implemented, and sure enough when the judge took a look at it, there was no real good reason why it wasn't getting implemented (Industry 7).

This participant refers to a court ruling “which has gone back the other way”, also presumably against their claimed trend for courts to find in favor of environmental litigants.

As is shown above, a discrepancy exists between this industry participant and the previous industry participant as to whether the environmental community actually wins many court cases or not. The former states that the environmental community’s legal claims, although frequent, are “so scurrilous they get rejected” and further claiming that “they don’t win a lot of the time” (Industry 11). The later implies quite the opposite while claiming that the environmental community’s success has largely depended on case law precedent that has created a “different”, and presumably lower, “gradient of success” (Industry 7).

The following environmental community participant explains their perspective on the difficulty of winning a NEPA lawsuit this way:

Traditionally one of the hardest services to sue is the Corps of Engineers. You know why, because they say, 'here is the disclosures of how we are going to screw up the environment and we are going to mess up the world and we are going to make people sick, and we are going to do it anyway!' You can't sue them under NEPA because they just disclosed what they are doing. The reason the FS is so sue able is because they never lay it out (Enviro Comm. 11).

This environmental community participant takes it a step further and makes another argument against the frivolous or scurrilous litigation claim as they speculate on the BNF’s legal strategizing for BAR project:

You cannot win in court on NEPA if they have disclosed all the information and tell the truth. For example on the BAR project, we wouldn't have had a leg to stand on in terms of NEPA if they would have just gone in and said we are damaging X percentage of Y, this unit is going to have the soil compacted, we are going to put in X number of tons of sediment, we are going to damage the Elk habitat effectiveness over here--all they have to do is tell the truth and disclose all the rationale and then completely legally forge on ahead and do it. It shouldn't be that hard to crank out a good NEPA analysis, the problem then though is that if they told the truth, the actual situation on the ground, the actual cumulative damage to a forest surface, then you've got NFMA legal arguments. They have damaged things so thoroughly that they're at or above the legal limits in terms of NFMA for maintaining species viability and soil productivity, etc (Enviro. Comm. 2).

This participant makes the claim that if the agency would simply disclose the damage that would result from implementing the project, they would not be open to NEPA procedural arguments. However, if the agency did fully disclose the damage that



was going to occur in the BAR analysis, they would be open to NFMA substantive arguments in court. This participant alludes to the question of how the agency uses the NEPA process and the input of the public—as a way to bulletproof their analysis, or as a way to change the substantive issues on the ground.

You don't really get anywhere by either micromanaging procedure or substance, they all are basically aimed at court, and your not going to go to court, you cant afford to go to court on a whim, or some small procedural issue or substantive issue, and so projects that look like there is not enough substantive issue or procedural issue to stop them in court then pretty much just let 'em go (Enviro. Comm. 2).

Furthermore, this environmental community participant discusses the use of procedural arguments in court and how they are not simply a method to stop a project, but rather a legitimate way to broaden the scope of the project through the inclusion of additional alternatives:

We have pinged them on procedural stuff which is also probably one of our criticisms, where we use procedure to get them. I mean the procedural stuff we have litigated on, you can say 'well that's frivolous because they just didn't follow some step', but the things we are really talking about is 'hey you didn't look at enough alternatives'. That's a little more--you can say that's procedural but in fact that goes to the core of the issue. We have a right, since a lot of people care about roadless areas, to have an alternative that protects roadless areas. That was one of our litigations, so you might say that's procedural but it still--the procedure still goes to our core values--some core value that we want them to look at (Enviro. Comm. 2).

Certainly the environmental community, early on in the process according to the following participant, was considering the possibility that their substantive concerns about the BAR project would only be addressed in front of a judge, and that there was enough deficiency in their analysis for the courts to find in favor of the plaintiffs:

Our comments to the draft were far more rock solid than any appeal I have ever been involved with. Right away, like, right after scoping I started calling attorneys and I got WELC and before the draft WELC signed on, so we had very good legal representation. Plus we started going to these researchers nationally to the horses mouth on research that we were finding in the project files before the draft, so by the time our comments to the draft were, we could go to court, they were totally solid, more than comments on a final or appeals. Anyway, it's a damn good thing we did that because at a couple of junctures like with this emergency exemption, by that time they knew, see that's why they were squirming so bad, when they saw our comments on the draft, they knew we had them pinned to the wall, there was absolutely no way they could come out with a legally sufficient and adequate analysis of the existing conditions let alone what the results of their proposed actions were going to be. The whole thing was, they were going to loose you know, and I think they knew right away that to do it accurately was going to take them years, even to find out what the soil conditions were (Enviro. Comm. 2).

### **FROM D.10. Mediated Settlement Agreement**

*D.10.1. Is Mediated Settlement a Valuable Way to Participate?* This environmental community participant explains the situation:

In this case I think there was the potential to come up with a settlement that everybody was happy with, or they could live with, I think that's always the case, at some point along the line people who might decide to litigate can sit down and try to negotiate, and that's who was involved in the mediation: those people who were on each side of the litigation plus the interveners who were the industry people who were the interested parties who had an interest in the outcome (Enviro. Comm. 9).

Referring to the value of the process, this participant indicated a basic value for the mediated settlement process describing it as, “a very structured, managed sort of complaint resolution” (Agency 5).

The following environmental community participant refers to the opportunity to directly affect the outcome of the treatments in a way that would reduce environmental impacts as a valuable aspect of the mediation: “It didn’t solve all the problems with it, we made some mistakes, obviously, it’s still 140 million board feet or whatever it was. But the environmental impacts were dramatically reduced (Enviro. Comm. 4). This feeling was generally held by all the environmental community participants in this study.

The issue of who participated in the settlement was at issue in many of the interviews. Participants from all three communities interviewed indicated that there was a lack of value in the process of mediation with regard to who participated.

In answering the question of how valuable this mediated settlement agreement process was, the following agency participant shares this perspective:

We were able to come out being able to do something relatively soon, so that had value, certainly. It was timing, we had a time, again, there was urgency, and it met the criteria for doing something soon. But again it cut the public out of the process, I am talking about everyday citizens, not the people who are aligned with 'amenities or commodities'. You know, 'that kinda stunk', is what I heard. Going behind closed doors and cutting a deal. That was troublesome to a lot of people (Agency 5).

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